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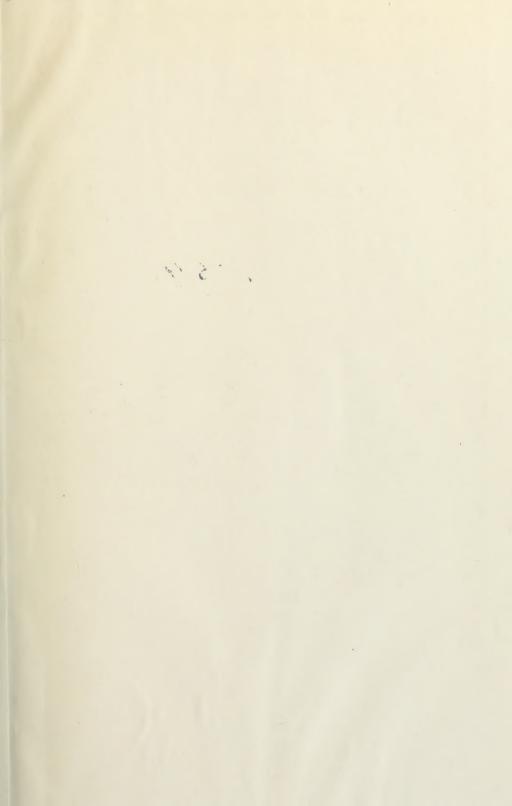
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1324 United States

Circuit Court of Appeals

For the Ninth Circuit.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation, and MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,

Plaintiffs in Error,

VS.

MAUDE E. STEWART,

Defendant in Error.

Transcript of Record.

Upon Writs of Error to the United States District Court of the Western District of Washington, Southern Division.



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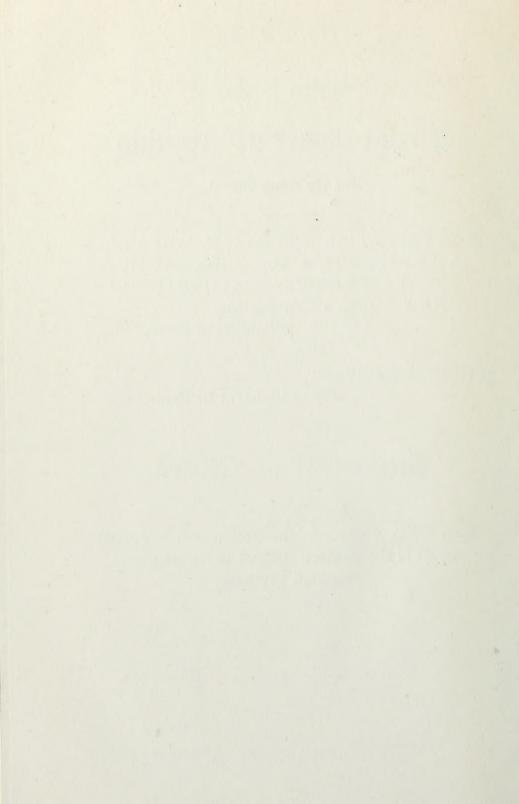
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Upon Writs of Error to the United States District Court of the Western District of Washington, Southern Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

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- RAMSEY, H. J., 660 Colman Building, Seattle, Washington,
- RUPP, OTTO B., 660 Colman Building, Seattle, Washington,

Attorneys for the Mutual Life Insurance Company of New York, Plaintiff in Error in Cause 3437, Consolidated with Cause 3436.

- FITCH, H. G., 308 State Building, Tacoma, Washington,
- HAYDEN, E. M., 523 Tacoma Building, Tacoma, Washington,
- LANGHORNE, M. A., 523 Tacoma Building, Tacoma, Washington,
- METZGER, F. D., 523 Tacoma Building, Tacoma, Washington,

Attorneys for Maude E. Stewart, Defendant in Error. [1*]

^{*}Page-number appearing at foot of page of original certified Transcript of Record.

In the United States District Court, for the Western District of Washington, Southern Division.

No. 3436.

MAUDE E. STEWART,

Plaintiff,

VS.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation,

Defendant.

Complaint.

The plaintiff, Maude E. Stewart, by her attorneys H. G. Fitch and Hayden, Langhorne & Metzger, & A. H. Imus brings this, her action against The Prudential Insurance Company of America, a corporation, organized and existing under and by virtue of the laws of the state of New Jersey, and for a cause of action alleges:

I.

That at all the times hereinafter mentioned the plaintiff, Maude E. Stewart, was and is now a citizen of the State of Washington, residing at Kelso, Cowlitz County, within the Southern Division of the Western District of the State of Washington.

II.

That at all the times hereinafter mentioned the defendant, The Prudential Insurance Company of America, was and is now a corporation duly organized and existing under and by virtue of the

laws of the state of New Jersey, and a resident and citizen of that state, and has been admitted to do business in the state of Washington, having complied with the laws of said state relative to foreign corporations transacting business within its boundaries. [2]

TIT.

That the matter and amount in the above-entitled action exceed, exclusive of costs or interest, the sum or value of \$3,000.

IV.

That on the 17th day of April, 1917, the defendant in consideration of the annual premium of \$749.50 paid by Frederick L. Stewart, then of Kelso, Cowlitz County, Washington, made their policy of insurance in writing, of which a copy is hereto annexed marked Exhibit "A," and made a part of this complaint as fully as if set out herein, and thereby insured the life of the said Frederick L. Stewart in the sum of \$25,000.

V.

That on the 17th day of March, 1921, the said Frederick L. Stewart, the insured, departed this life. That on said date the policy of insurance attached hereto and marked Exhibit "A" was in full force and effect, the last annual premium having been paid thereon.

VI.

That the plaintiff, Maude E. Stewart, is the identical person named in said policy of insurance as the beneficiary, and was prior to the 17th day of

March, 1921, the wife and is now the widow of the said Frederick L. Stewart.

VII.

That prior to the commencement of this action the plaintiff furnished to the defendant, The Prudential Insurance Company of America, a corporation, with proof of the death of the said Frederick L. Stewart, and she performed all the conditions of said contract of insurance on her part to be kept and performed. [3]

VIII.

That under and by the terms of the said policy of insurance the sum of \$25,000 became payable to the plaintiff upon receipt of proof of the death of the said Frederick L. Stewart by the defendant, The Prudential Insurance Company of America, at its home office in Newark, New Jersey, which proof of death was as heretofore alleged made to the said defendant prior to the commencement of this action.

IX.

That defendant has not paid to plaintiff the sum of \$25,000, and said sum is now due thereon to this plaintiff.

FOR A SECOND CAUSE OF ACTION PLAINTIFF ALLEGES:

I.

That at all the times hereinafter mentioned the plaintiff, Maude E. Stewart was and is now a citizen of the State of Washington, residing at Kelso, Cowlitz County, within the Southern Divi-

sion of the Western District of the state of Washington.

II.

That at all the times hereinafter mentioned the defendant, The Prudential Insurance Company of America, was and is now a corporation duly organized and existing under and by virtue of the laws of the state of New Jersey, and a resident and citizen of that state, and has been admitted to do business in the state of Washington, having complied with the laws of said state relative to foreign corporations transacting business within its boundaries.

TIT

That the matter and amount in the above-entitled action exceed [4] exclusive of costs or interest, the sum or value of \$3,000.

IV.

That on the 17th day of August, 1915, the defendant in consideration of the annual premium of \$138.95, paid by Frederick L. Stewart, then of Kelso, Cowlitz County, Washington, made their policy of insurance in writing, of which a copy is hereto annexed marked Exhibit "B," and made a part of this complaint as fully as if set out herein, and hereby insured the life of the said Frederick L. Stewart in the sum of \$5,000.

V.

That on the 17th day of March, 1921, the said Frederick L. Stewart, the insured, departed this life. That on said date the policy of insurance attached hereto and maked Exhibit "B" was in full

force and effect, the last annual premium having been paid thereon.

VI.

That the plaintiff, Maude E. Stewart, is the identical person named is said policy of insurance as the beneficiary, and was prior to the 17th day of March, 1921, the wife and is now the widow of the said Frederick L. Stewart.

VII.

That prior to the commencement of this action the plaintiff furnished to the defendant, The Prudential Insurance Company of America, a corporation, with proof of the death of the said Frederick L. Stewart, and she performed all the conditions of said contract of insurance on her part to be kept and performed.

VIII.

That under and by the terms of the said policy of insurance the sum of \$5,000 became payable to the plaintiff upon receipt [5] of proof of the death of the said Frederick L. Stewart by the defendant, The Prudential Insurance Company of America, at its home office in Newark, New Jersey, which proof of death was as heretofore alleged made to the said defendant prior to the commencement of this action.

IX.

That defendant has not paid to the plaintiff the sum of \$5,000, and said sum is now due thereon to this plaintiff.

FOR A THIRD CAUSE OF ACTION PLAINTIFF ALLEGES:

I.

That at all the times hereinafter mentioned the plaintiff, Maude E. Stewart, was and is now a citizen of the State of Washington, residing at Kelso, Cowlitz County, within the Southern Division of the Western District of the State of Washington.

II.

That at all the times hereinafter mentioned the defendant, The Prudential Insurance Company of America, was and is now a corporation duly organized and existing under and by virtue of the laws of the state of New Jersey, and a resident and citizen of that state, and has been admitted to do business in the state of Washington, having complied with the laws of said state relative to foreign corporations transacting business within its boundaries.

III.

That the matter and amount in the above-entitled action exceed, exclusive of costs or interest, the sum or value of \$3,000.

IV.

That on the 7th day of August, 1916, the defendant in [6] consideration of the annual premium of \$144.25, paid by Frederick L. Stewart, then of Kelso, Cowlitz County, State of Washington, made their policy of insurance in writing, of which a copy is hereto annexed, marked Exhibit "C," and made a part of this complaint as fully as if set out herein and thereby insured the life

of the said Frederick L. Stewart in the sum of \$5,000.

V.

That on the 17th day of March, 1921, the said Frederick L. Stewart, the insured, departed this life. That on said date the policy of insurance attached hereto and marked Exhibit "C" was in full force and effect, the last annual premium having been paid thereon.

VI.

That the plaintiff, Maude E. Stewart, is the identical person named in said policy of insurance as the beneficiary, and was prior to the 17th day of March, 1921, the wife and is now the widow of the said Frederick L. Stewart.

VII.

That prior to the commencement of this action the plaintiff furnished to the defendant, The Prudential Insurance Company of America, a corporation, with proof of the death of the said Frederick L. Stewart, and she performed all the conditions of said contract of insurance on her part to be kept and performed.

VIII.

That under and by the terms of the said policy of insurance the sum of \$5,000 became payable to the plaintiff upon receipt of proof of the death of the said Frederick L. Stewart by the defendant, The Prudential Insurance Company of America, at its home office in Newark, New Jersey, which proof of death was [7] as hereinbefore alleged

made to the said defendant prior to the commencement of this action.

IX.

That the defendant has not paid to plaintiff the sum of \$5,000, and said sum is now due thereon to this plaintiff.

WHEREFORE, plaintiff prays judgment against the defendant, The Prudential Insurance Company of America, a corporation, as follows:

- 1. On the first cause of action in the sum of Twenty-five Thousand Dollars (\$25,000).
- 2. On the second cause of action in the sum of Five Thousand Dollars (\$5,000).
- 3. On the third cause of action in the sum of Five Thousand Dollars (\$5,000).

Or a total of Thirtyfive Thousand Dollars (\$35,000), and her costs and disbursements of this action.

H. G. FITCH, HAYDEN, LANGHORN & METZGER, A. H. IMUS, Solicitors for Plaintiff.

United States of America, Western District of Washington, Southern Division,—ss.

H. G. Fitch, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action. That he has read the foregoing complaint, knows the contents thereof, and believes the same to be true. That he makes this verification for the reason that the plaintiff, Maude E. Stewart, is temporarily

absent from the state of Washington, and all the facts connected with the three [8] causes of action set forth in the complaint are within the personal knowledge of this affiant.

H. G. FITCH.

Subscribed and sworn to before me this 25th day of July, 1921.

[Notary Seal] M. A. LANGHORN, Notary Public in and for the State of Washington, Residing at Tacoma. [9]

Exhibit "A."

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

IN CONSIDERATION of the Application for this Policy, which is hereby made a part of this contract, a copy of which Application is attached hereto, and of the payment, in the manner specified, of the premium herein stated, hereby insures the life of the person herein designated as the Insured, for the amount named herein, payable as specified, subject to the provisions on the second and third pages hereof, which are hereby made part of this contract.

The Insured—Frederick L. Stewart.

Amount of Insurance—Twenty-Five Thousand Dollars, payable immediately upon receipt of due proof of the death of the insured during the continuance of this Policy, at the Home Office of the company, in Newark, New Jersey.

Payable to Maude E. Stewart, Beneficiary, Wife of the Insured.

If there be no Beneficiary living at the death of the Insured, the amount of insurance shall be payable to the executors, administrators or assigns of the Insured, unless otherwise provided in the Policy. The right to change the Beneficiary has been reserved by the Insured.

Annual Premium.—Seven Hundred Forty-Nine and 50/100 Dollars, payable on the delivery of this Policy, the receipt of which premium is hereby acknowledged, and a like amount payable thereafter annually at the Home Office of the Company, or as provided under the heading "General Provisions" on the second page hereof, in exchange for the Company's receipt on or before the seventh day of April in every year during the continuance of this Policy.

IN WITNESS WHEREOF, the said THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, at its office in the City of Newark, New Jersey has caused this policy to be signed by its President and its secretary, and to be duly attested, this seventeenth day of April, one thousand nine hundred and seventeen.

FORREST F. DRYDEN,

President.

Attest: WILLARD I. HAMILTON,

Secretary.

Age 44.

HENRY ELIE.

WHOLE LIFE POLICY—ANNUAL DIVI-DENDS. PREMIUMS PAYABLE FOR LIFE. (End of Page 1.)

Exhibit "B."

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

IN CONSIDERATION of the Application for this Policy, which is hereby made a part of this contract, a copy of which application is attached hereto, and of the payment, in the manner specified, of the premium herein stated, hereby insured the life of the person herein designated as the Insured, for the amount named herein, payable as specified, subject to the privileges and provisions on the second and third pages hereof, which are hereby made part of this contract.

THE INSURED FREDERICK L. STEWART. AMOUNT OF INSURANCE FIVE THOUSAND

Dollars, payable immediately upon receipt of due proof of the death of the Insured during the continuance of this Policy, at the Home Office of the Company, in Newark, New Jersey.

PAYABLE TO

MAUDE E. STEWART, Beneficiary, Wife of the Insured.

If the Beneficiary survive the Insured, otherwise to the executors, administrators or assigns of the Insured.

PREMIUM.—ONE HUNDRED, THIRTY-EIGHT AND 95/100 Dollars, payable on the delivery of this Policy and thereafter annually at the Home Office of the Company, or as provided

under the heading "Provisions" on the second page hereof, in exchange for the Company's receipt on or before the seventeenth day of August in every year during the continuance of this Policy.

IN WITNESS WHEREOF, the said THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, at its offices in the City of Newark, New Jersey, has caused this Policy to be signed by its President and its Secretary, and to be duly attested, this seventeenth day of August, one thousand nine hundred and fifteen.

FORREST F. DRYDEN,

President.

WILLARD I. HAMILTON,

Secretary.

Attest: FRED C. RYAN.

Age 42.

WHOLE LIFE POLICY—ANNUAL DIVI-DENDS. PREMIUMS PAYABLE FOR LIFE. (End of Page 1.)

Exhibit "C."

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

IN CONSIDERATION of the Application for this Policy, which is hereby made a part of this contract, a copy of which application is attached hereto, and of the payment, in the manner specified of the premium herein stated, hereby insures the life of the person herein designated as the Insured, for the amount named herein payable as specified, subject to the provisions on the second and third pages hereof, which are hereby made a part of this contract.

THE INSURED—FREDERICK L. STEW-ART.

AMOUNT OF INSURANCE—FIVE THOU-SAND Dollars, payable immediately upon receipt of due proof of the death of the Insured during the continuance of this Policy, at the Home Office of the Company, in Newark, New Jersey.

PAYABLE TO MAUDE E. STEWART, Beneficiary, Wife of the Insured.

If there be no Beneficiary living at the death of the Insured the amount of insurance shall be payable to the executors administrators, or assigns of the Insured, unless otherwise provided in the Policy. The right to change the Beneficiary has been reserved by the Insured.

ANNUAL PREMIUM — One hundred forty-four and 25/100 Dollars, payable on the delivery of this Policy, the receipt of which premium is hereby acknowledged, and a like amount payable thereafter annually at the Home Office of the Company, or as provided under the heading "General Provisions" on the second page hereof, in exchange for the company's receipt on or before the seventh day of August, in every year during the continuance of this Policy.

IN WITNESS WHEREOF, the said THE PRU-DENTIAL INSURANCE COMPANY OF AMER-ICA, at its office in the City of Newark, New Jersey, has caused this Policy to be signed by its President and its Secretary, and to be duly attested, this seventh day of August, one thousand nine hundred and sixteen.

FORREST F. DRYDEN,

President.

WILLARD I. HAMILTON,

Secretary.

Attest: ORN HAULEY.

AGE 43.

WHOLE LIFE POLICY—ANNUAL DIVI-DENDS. PREMIUMS PAYABLE FOR LIFE.

(End of Page 1.)

[Indorsed]: Aug. 1, 1922. [48]

No. 3436.

Amendment to Complaint.

Now comes the plaintiff in the above-entitled action and in compliance with the order of the Court hereby amends Paragraph V of the complaint on file in this action so that the same as amended shall read as follows:

V.

That on the 17th day of March, 1921, the said Frederick L. Stewart, the insured, departed this life, by being drowned in the waters of the Columbia River. That said Stewart fell into the waters of the said Columbia River from a ferry-boat that was at the time about one-half mile distant from the Washington shore line.

That at the time of the death of the said Frederick L. Stewart said policy of insurance was in full force

and effect, the last annual premium having been duly paid thereon."

H. G. FITCH,

HAYDEN, LANGHORNE & METZGER

and A. H. IMUS,

Attorneys for Plaintiff.

[Indorsed]: Nov. 14, 1921. [49]

No. 3436.

Answer.

Now comes the defendant and for an answer to plaintiff's complaint admits and denies:

I.

In answer to paragraph 1, of plaintiff's first cause of action, it denies the same and the whole thereof.

II.

Answering paragraph 5, of the first cause of action in said complaint, it denies the same and the whole thereof.

III.

Answering paragraph 6, of the first cause of action, it denies the plaintiff is the widow of said Frederick L. Stewart.

TV.

Answering paragraph 7, of the first cause of action in said complaint, it denies the same and the whole thereof.

V.

Answering paragraphs 8 and 9, of the first cause of action in said complaint, it denies the same and the whole thereof. [50]

VI.

Answering paragraph 1, of the second cause of action in said complaint, it denies the same and the whole thereof.

VII.

Answering paragraph 5, of the second cause of action in said complaint, it denies the same and the whole thereof.

VIII.

Answering paragraph 6, of the second cause of action in said complaint, it denies that Maude E. Stewart is the widow of said Frederick L. Stewart.

IX.

Answering paragraph 7, of the second cause of action in said complaint, it denies the same and the whole thereof.

X.

Answering paragraph 8 and 9 of the second cause of action in said complaint, it denies the same and the whole thereof.

XI.

Answering paragraph 1, of the third cause of action in said complaint, it denies the same and the whole thereof.

XII.

Answering paragraph 5, of the third cause of action in said complaint, it denies the same and the whole thereof.

XIII.

Answering paragraph 6, of the third cause of action in said complaint, it denies that Maude E. Stewart is the widow of said Frederick L. Stewart.

XIV.

Answering paragraph 7, of the third cause of action in said complaint, it denies the same and the whole thereof. [51]

XV.

Answering paragraph 8 and 9 of the third cause of action in said complaint, it denies the same and the whole thereof.

WHEREFORE, defendant prays judgment for the dismissal of said action and for its costs and disbursements.

S. A. KEENAN,
S. V. CAREY,
Attorneys for Defendant.

State of Washington, County of King,—ss.

S. A. Keenan, being first duly sworn on his oath states: That he has read the foregoing answer and believes it to be true, that he is one of the attorneys for defendant herein; that he makes this verification for defendant because it is a foreign corporation, and none of its officers are in this state or county.

S. A. KEENAN.

Subscribed and sworn to before me this 18th day of November, 1921.

[Notarial Seal] E. P. DONNELLY, Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Feb. 1, 1922. [52]

No. 3437.

Complaint.

Comes now the plaintiff, Maude E. Stewart, by her attorneys, H. G. Fitch and Hayden, Langhorne & Metzger, and A. H. Imus and for a cause of action against the defendant, The Mutual Life Insurance Company of New York, alleges:

T.

That at all the times hereinafter mentioned the plaintiff, Maude E. Stewart, was and is now a citizen of the State of Washington, residing at Kelso, Cowlitz County, within the Southern Division of the Western District of said state.

II.

That at all the times hereinafter mentioned the defendant, The Mutual Life Insurance Company of New York, was and is now a foreign corporation, duly organized and existing, as plaintiff is informed and believes, under and by virtue of the laws of the state of New York, and a resident and citizen of the state of New York, but has been admitted to do business in the state of Washington, having complied with the laws of the said state of Washington relative to foreign corporations transacting business within its boundaries.

III.

That the matter and amount in the above-entitled action [53] exceeds exclusive of cost or interest, the sum or value of \$3,000.00.

IV.

That on the 15th day of July, 1915, the defendant,

The Mutual Life Insurance Company of New York, in consideration of the annual premium of \$179.20, paid to it by Frederick L. Stewart, made their policy of insurance to him in writing, of which a copy is hereunto annexed marked Exhibit "A," and made a part of this complaint and prayed to be taken as such, and thereby insured the life of the said Frederick L. Stewart, in the sum of \$5,000.

V.

That your plaintiff, Maude E. Stewart, the beneficiary named in said policy of insurance so attached hereto and marked Exhibit "A" and named as beneficiary therein, was the wife and is now the widow of the said Frederick L. Stewart, who departed this life on the 17th day of March, 1921. That at the time of the death of the said Frederick L. Stewart said policy of insurance, marked Exhibit "A" was in full force and effect, the annual premium having been duly paid thereon.

VI.

That prior to the commencement of this action the plaintiff, the beneficiary named in said policy of insurance, furnished defendant, The Mutual Life Insurance Company of New York, at its home office in the city of New York in said state, due proof of the death of the said Frederick L. Stewart, and otherwise duly performed all the conditions of said policy of insurance on her part to be by her kept and performed.

VII.

That the defendant has not paid to the plaintiff

the sum of \$5,000, and said sum is now due thereon to this plaintiff. [54]

FOR A SECOND CAUSE OF ACTION plaintiff alleges:

I.

That at all the times hereinafter mentioned the plaintiff, Maude E. Stewart, was and is now a citizen of the state of Washington, residing at Kelso, Cowlitz County, within the Southern Division of the Western District of said state.

II.

That at all the times hereinafter mentioned the defendant, The Mutual Life Insurance Company of New York, was and is now a foreign corporation, duly organized and existing as plaintiff is informed and believes, under and by virtue of the laws of the state of New York, and a resident and citizen of the state of New York, but has been admitted to do business in the state of Washington, having complied with the laws of the said state of Washington relative to foreign corporations transacting business within its boundaries.

III.

That the matter and amount in the above-entitled action exceeds, exclusive of cost or interest, the sum or value of \$3,000.

IV.

That on the 28th day of July, 1915, the defendant, The Mutual Life Insurance Company of New York, in consideration of the annual premium of \$179.20, paid to it by Frederick L. Stewart, made their policy of insurance to him in writing, of which

a copy is hereunto annexed, marked Exhibit "B," and made a part of this complaint and prayed to be taken as such, and thereby insured the life of the said Frederick L. Stewart in the sum of \$5,000.

V.

That your plaintiff, Maude E. Stewart, the beneficiary [55] named in said policy of insurance so attached hereto and marked Exhibit "B," and named as beneficiary therein, was the wife and is now the widow of the said Frederick L. Stewart, who departed this life on the 17th day of March, 1921. That at the time of the death of the said Frederick L. Stewart said policy of insurance, marked Exhibit "B" was in full force and effect, the annual premium having been duly paid thereon.

VI.

That prior to the commencement of this action the plaintiff, the beneficiary named in said policy of insurance, furnished defendant, The Mutual Life Insurance Company of New York, at its home office in the city of New York in said state, due proof of the death of the said Frederick L. Stewart, and otherwise duly performed all the conditions of said policy of insurance on her part to be by her kept and performed.

VII.

That the defendant has not paid to the plaintiff the sum of \$5,000 and said sum is now due thereon to this plaintiff.

WHEREFORE plaintiff prays judgment against the defendant, The Mutual Life Insurance Company of New York, a corporation, as follows:

- 1. On the first cause of action in the sum of Five Thousand Dollars (\$5,000).
- 2. On the second cause of action in the sum of Five Thousand Dollars (\$5,000).

Or a total of Ten Thousand Dollars (\$10,000) and her costs and disbursements of this action.

H. G. FITCH, A. H. IMUS,

HAYDEN, LANGHORN & METZGER, Attorneys for Plaintiff. [56]

United States of America, Western District of Washington, Southern Division,—ss.

H. G. Fitch, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true. That he makes this verification for the reason that the plaintiff Maude E. Stewart is temporarily absent from the state of Washington, and all the facts connected with the two causes of action set forth in the complaint are within the personal knowledge of this affiant.

H. G. FITCH.

Subscribed and sworn to before me this 25th day of July, 1921.

[Notarial Seal] M. A. LANGHORNE, Notary Public in and for the State of Washington, Residing at Tacoma. [57]

Exhibit "A."

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Ordinary Life.

IN CONSIDERATION of the annual premium of One Hundred Seventy-nine and 20/100 Dollars, the receipt of which is hereby acknowledged, and of the payment of a like amount upon each Fifteenth day of July hereafter until the death of the Insured,

PROMISES to pay at the Home Office of the Company in the City of New York upon receipt at said Home Office of due proof of the death of

Frederick L. Stewart,

of Kelso, County of Cowlitz, State of Washington, herein called the Insured,

Five Thousand Dollars

less any indebtedness hereon to the Company and any unpaid portion of the premium for the then current policy year, upon surrender of this Policy properly receipted, to his wife Maude E. Stewart, the beneficiary with the right to the INSURED TO CHANGE THE BENEFICIARY.

DEATH OF BENEFICIARY BEFORE IN-SURED: CHANGE OF BENEFICIARY. If any beneficiary die before the Insured, the interest of such beneficiary shall vest in the Insured, unless otherwise provided herein.

When the interest of a beneficiary shall have vested in the Insured, or when the right to change the beneficiary has been reserved, the Insured, if there be no existing assignment of this Policy, may, while this Policy is in force, designate a new beneficiary, with or without reserving the right to change the beneficiary by filing written notice thereof at the Home Office of the Company accompanied by this Policy for suitable endorsement hereon. Such change shall take effect upon the endorsement of the same on the Policy by the Company.

PREMIUMS.—All Premiums are payable in advance at said Home Office or to any agent of the Company upon delivery, on or before date due, of a receipt signed by either the President, Vice-President, Second Vice-President, Secretary or Treasurer of the Company and countersigned by said agent.

A grace of thirty days (or one month if greater), subject to an interest charge at the rate of five per centum per annum, shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force. If death occur within the period of grace, the overdue premium and the unpaid portion of the premium for the then current policy-year, if any, shall be deducted from the amount payable hereunder.

Except as herein provided the payment of a premium or instalment thereof shall not maintain this Policy in [58] force beyond the date when the next premium or instalment thereof is payable. If any premium or instalment thereof be not paid before the end of the period of grace, then this Policy shall immediately cease and become void,

and all premiums previously paid shall be forfeited to the Company except as hereinafter provided.

CONDITIONS:

RESIDENCE AND TRAVEL.—This Policy is free from any restriction as to residence and travel.

OCCUPATION.—This policy is free from any restriction as to military or naval service, and, as to other occupations of the Insured, it is free from any restriction after one year from its date of issue as set forth in the provisions of the application endorsed hereon or attached hereto.

(In Margin:)

OCCUPATION.—This Policy is free from any restriction as to Military or Naval service as well as all other occupations of the Insured after one year from its date of issue, as set forth in the provisions of the application and the "Special Provision" clause endorsed hereon or attached hereto. (This clause was substituted before issuance of the Policy for the clause in the Policy entitled "Occupation" which was deleted).

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

W. J. EASTON,

Secretary.

SUICIDE.—The Company shall not be liable hereunder in the event of the Insured's death by his own act, whether sane or insane, during the period of one year after the date of issue of this Policy as set forth in the provisions of the application endorsed hereon or attached hereto.

INCONTESTABILITY.—This Policy shall be incontestable, except for non-payment of premiums, provided two years shall have elapsed from its date of issue.

This Policy and the application herefor, copy of which is endorsed hereon or attached hereto, constitute the entire contract between the parties hereto. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement of the Insured shall avoid or be used in defence to a claim under this Policy unless contained in the written application herefor and a copy of the application is endorsed on or attached to this Policy when issued.

If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

(At bottom of Page 1.)

Amount of

insurance Premiums payable Annual payable at death during life Dividends [59]

"Exhibit B."

ORDINARY LIFE

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Number 2244868

IN CONSIDERATION of the annual premium of One Hundred Seventy-nine and 20/100 Dollars, the receipt of which is hereby acknowledged, and of the payment of a like amount upon each Twenty-eighth day of July, hereafter until the death of the Insured,

Amount \$5000.

PROMISES TO PAY at the Home Office of the Company in the City of New York upon receipt at said Home Office of due proof of the death of FREDERICK L. STEWART.

Age 42

of Kelso, County of Cowlitz, State of Washington, herein called the Insured,

Annual Premium \$179.20

FIVE THOUSAND DOLLARS

less any indebtedness hereon to the Company and any unpaid portion of the premium for the then current policy-year, upon surrender of this Policy properly receipted to his wife, Maude E. Stewart, the beneficiary, with the right to the insured to change the beneficiary.

DEATH OF BENEFICIARY BEFORE IN-SURED: CHANGE OF BENEFICIARY. If any beneficiary die before the Insured, the interest of such beneficiary shall vest in the Insured, unless otherwise provided herein.

When the interest of a beneficiary shall have vested in the Insured, or when the right to change the beneficiary has been reserved, the Insured, if there be no existing assignment of this Policy may, while this Policy is in force, designate a new beneficiary, with or without reserving the right to change the beneficiary, by filing written notice thereof at the Home Office of the Company accompanied by this Policy for suitable endorsement hereon. Such change shall take effect upon the endorsement of the same on the Policy by the Company.

PREMIUMS. All premiums are payable in advance at said Home Office or to any agent of the Company upon delivery, on or before date due, of a receipt signed by either the President, Vice-President, Second Vice-President, Secretary or Treasurer of the Company and countersigned by said agent.

A grace of thirty days (or one month if greater), subject to an interest charge at the rate of five per centum per annum, shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force. If death occur within the period of grace, the overdue premium and the unpaid portion of the premium for the then current policy-year, if any, shall be deducted from the amount payable hereunder.

Except as herein provided the payment of a premium or instalment thereof shall not maintain this Policy in force beyond the date when the next premium or instalment thereof is payable. If any premium or instalment thereof be not paid before

the end of the period of grace, [73] then this Policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company except as hereinafter provided. CONDITIONS:

Residence & Travel. This Policy is free from any restriction as to residence and travel.

Occupation. This Policy is free from any restriction as to military or naval service, and as to other occupations of the insured, it is free from any restriction after one year from its date of issue, as set forth in the provisions of the application endorsed hereon or attached hereto.

(In margin:) OCCUPATION.—This Policy is free from any restriction as to military or naval service as well as all other occupations of the Insured after one year from its date of issue, as set forth in the provisions of the application and the "Special Provisions" clause endorsed hereon or attached hereto. (This clause was substituted before issuance of the Policy for the clause in the Policy entitled "Occupation" which was deleted."

THE MUTUAL LIFE INSURANCE COM-PANY OF NEW YORK.

W. J. EASTON,

Secretary.

SUICIDE. The Company shall not be liable hereunder in the event of the Insured's death by his own act, whether sane or insane, during the period of one year after the date of issue of this policy, as set forth in the provisions of the application endorsed hereon or attached hereto.

INCONTESTABILITY. This Policy shall be incontestable, except for non-payment of premiums, provided two years shall have elapsed from its date of issue.

This policy and the application herefor, copy of which is endorsed hereon or attached hereto, constitute the entire contract between the parties hereto. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement of the Insured shall avoid or be used in defence to a claim under this Policy unless contained in the written application herefor and a copy of the application is endorsed on or attached to this Policy when issued.

If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Amount of Insurance Payable at Death. Annual Dividend Premiums Payable During Life.

(End of Page 1.)

[Indorsed]: Aug. 1, 1922. [86]

No. 3437.

Answer.

Comes now the defendant, The Mutual Life Insurance Company of New York, a corporation, and for answer to the complaint heretofore filed herein admits, alleges and denies as follows:

I.

For answer to paragraph I of said complaint this defendant says that it has no knowledge or information sufficient to form a belief as to the truth of the matters and things in said paragraph I alleged, and therefore denies the same.

II.

For answer to paragraph V of said complaint this defendant admits that Maude E. Stewart, the above-named plaintiff, is the beneficiary named in said policy of insurance, and admits that she was the wife of one Frederick L. Stewart, and admits that on the 17th day of March, 1921, the annual premium had been paid on said policy of insurance, but denies each and every other allegation in said paragraph V contained. [87]

III.

For answer to paragraph VI of said complaint this defendant denies each and every allegation therein contained.

IV.

For answer to paragraph VII of said complaint this defendant admits that it has not paid to said Maude E. Stewart the sum of Five Thousand Dollars (\$5,000.00), but denies each and every other allegation in said paragraph VII contained.

For answer to the second cause of action set forth in plaintiff's complaint this defendant admits, denies and alleges as follows:

I.

For answer to paragraph I of said second cause of action set forth in plaintiff's complaint this de-

fendant says that it has no knowledge or information sufficient to form a belief as to the truth of the matters or things in said paragraph I contained, and therefore denies the same.

II.

For answer to paragraph V of said second cause of action set forth in said complaint this defendant admits that the plaintiff, Maude E. Stewart, is the beneficiary named in the policy of insurance issued by this defendant on the 28th day of July, 1915, to one Frederick L. Stewart, and admits that said Maude E. Stewart was the wife of said Frederick L. Stewart, and admits that on the 17th day of March, 1921, the annual premium had been paid on said policy of insurance, but denies each and every other allegation in said paragraph V contained. [88]

III.

For answer to paragraph VI of said second cause of action set forth in plaintiff's complaint this defendant denies each and every allegation therein contained.

IV.

For answer to paragraph VII of the second cause of action set forth in plaintiff's complaint this defendant admits that it has not paid to the plaintiff, Maude E. Stewart, the sum of Five Thousand Dollars (\$5,000.00), but denies each and every other allegation in said paragraph contained.

WHEREFORE, this defendant having fully answered prays that it may go hence with its costs.

CHADWICK, McMICKEN, RAMSEY & RUPP,

Attorneys for Defendant. [89]

State of Washington, County of King,—ss.

W. A. M. Smith, being first duly sworn on oath says: That he is Manager of the Mutual Life Insurance Company of NewYork, a corporation, defendant above named; and makes this verification on its behalf; that he has read the foregoing Answer, knows the contents thereof and believes the same to be true.

W. A. M. SMITH.

Subscribed and sworn to before me this 8th day of September, 1921.

[Seal]

J. E. PETERSON,

Notary Public in and for the State of Washington, Residing in Seattle.

[Endorsed]: Sept. 8, 1921. [90]

No. 3436.

Stipulation Re Consolidation of Causes.

IT IS HEREBY STIPULATED by and between H. G. Fitch and Hayden, Langhorne & Metzger, attorneys for the plaintiff, and S. A. Keenan, attorney for the defendant, as follows:

1. That a trial by jury of the above-entitled action be and the same is hereby expressly waived. That said cause shall be submitted to and tried by the Honorable E. E. Cushman, Judge of the United States District Court for the Western District of Washington, Southern Division, and that an order

may be entered and spread upon the minutes of the court waiving the trial by jury and carrying into effect this stipulation.

- 2. That this cause shall be consolidated with the case of Maud E. Stewart vs. Mutual Life Insurance Company of New York, a corporation, now pending in this court, and the testimony introduced by either party shall be applicable to both causes, or to either, as the case may be.
- 3. That if either party to this action shall feel aggrieved by the decision rendered in this cause, or in the cause of Maude E. Stewart vs. Mutual Life Insurance Company of New York, then the party so feeling herself or itself aggrieved may remove said cause to the United States [91] Circuit Court of Appeals, and for that purpose separate or joint writs of error may be sued out as the parties are advised.

Dated this 23d day of March, 1922.

H. G. FITCH and

HAYDEN, LANGHORNE & METZGER,

Attorneys for Plaintiff.

S. A. KEENAN,

STEPHEN V. CAREY,

Attorneys for Defendant.

[Endorsed]: Mar. 27, 1922. [92]

No. 3437.

Stipulation Re Consolidation of Causes.

IT IS HEREBY STIPULATED by and between H. G. Fitch and Hayden, Langhorne & Metzger, attorneys for the plaintiff, and Chadwick, McMicken,

Ramsey & Rupp, attorneys for the defendant, as follows:

- 1. That a trial by jury of the above-entitled action be and the same is hereby expressly waived. That said cause shall be submitted to and tried by the Honorable E. E. Cushman, Judge of the United States District Court for the Western District of Washington, Southern Division, and that an order may be entered and spread upon the minutes of the court waiving the trial by jury and carrying into effect this stipulation.
- 2. That this cause shall be consolidated with the case of Maude E. Stewart vs. Prudential Insurance Company of America, a corporation, now pending in this court, and the testimony introduced by either party shall be applicable to both causes, or to either, as the case may be.
- 3. That if either party to this action shall feel aggrieved by the decision rendered in this case, or in the case of Maude E. Stewart vs. Prudential Insurance Company of America, then the party so feeling herself or itself aggrieved, may remove said cause to the United States Circuit Court of Appeals, and for that purpose separate or joint writ of error may be sued out as the parties are advised.

Dated this 23d day of March, 1922.

H. G. FITCH and HAYDEN, LANGHORNE & METZGER, Attorneys for Plaintiff. CHADWICK, McMICKEN, RAMSEY

RUPP,
Attorneys for Defendant. [93]

[Endorsed]: Mar. 24, 1922. [94]

No. 3436.

Order of Consolidation.

The parties in this action, by their respective attorneys having stipulated to waive a trial by jury, and to consolidate this cause with a certain cause now pending in this court, wherein the above-named plaintiff is plaintiff and the Mutual Life Insurance Company is defendant, and hear both cases at the same time upon such testimony as may be applicable to either:

IT IS NOW ORDERED that said causes be and they are hereby consolidated for the purpose of trial.

Dated this 4th day of April, 1922.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Apr. 4, 1922. [95]

No. 3437.

Order of Consolidation.

The parties in this action, by their respective attorneys, having stipulated to waive a trial by jury and to consolidate this cause with a certain cause now pending in this court, wherein the above-named plaintiff is plaintiff and the Prudential Insurance Company of America is defendant, and hear both cases at the same time upon such testimony as may be applicable to either:

IT IS NOW ORDERED that said cases be and they are hereby consolidated for the purposes of trial.

Dated this 4th day of April, 1922. EDWARD E. CUSHMAN,

[Endorsed]: Apr. 4, 1922. [96]

No. 3436.

Notice to Produce Certain Evidence.

To Prudential Insurance Company of America, and to S. A. Keenan and Stephen V. Carey, their Attorneys:

YOU ARE HEREBY notified and required to produce upon the trial of the above-entitled action, in addition to the original documents, evidence and letters called for in a former notice, the following:

- 1. The original letters written by H. G. Fitch to the Prudential Insurance Company under the date of May 13, 192.
- 2. Original letter of July 14, 1921, written by Hayden, Langhorne & Metzger, attorneys for plaintiff, to the Prudential Insurance Company of America at Newark, New Jersey, the receipt of each of said letters being acknowledged under date of July 20, 1921, by said company.

And in the event of your failure or refusal to produce the originals of the letters so called for, plaintiff will offer secondary evidence as to the contents of the same.

Dated March 28th, 1922.

H. G. FITCH and HAYDEN, LANGHORNE & METZGER, Attorneys for Plaintiff.

[Endorsed]: Mar. 31, 1922. [97]

No. 3437.

Notice to Produce Certain Evidence.

To the Mutual Life Insurance Company of New York, a Corporation, Defendant, and to Chadwick, McMicken, Ramsey & Rupp, Attorneys for Defendant:

YOU ARE HEREBY REQUIRED to produce upon the trial of the above-entitled action the originals of the following documents, letters and affidavits:

- 1. Original letter written by F. J. Sardam under date of April 9, 1921, to Mr. W. A. M. Smith, manager of the Mutual Life Insurance Company, Stuart Bldg., Seattle, Washington, together with the original proofs of death of F. L. Stewart signed by Maude E. Stewart, the beneficiary who is plaintiff in the above-entitled action.
- 2. Original letter of March 23, 1921, written by F. J. Sardam to Mutual Life Insurance Company, New York City, New York, on behalf of Maude E. Stewart, the beneficiary under policies No. 2242058 and 2244868, issued by the said Mutual Life Insurance Company on the life of Frederick L. Stewart.
- 3. Original affidavit of Maude E. Stewart, the beneficiary under policy No. 2242058, which affidavit was sent to defendant under the date of May 13, 1921; also original letter of H. G. Fitch, enclosing said affidavit. [98]
- 4. Original affidavit of Maude E. Stewart, the beneficiary under policy No. 2244868, which affidavit

was sent to defendant under date of May 13, 1921, also original letter of H. G. Fitch, enclosing said affidavit.

5. Original affidavit of Paul G. Shotswell, sent to Mutual Life Insurance Company, the defendant, on July 13, 1921, and original letter of Hayden, Langhorne & Metzger, written under date of July 13, 1921, accompanying the affidavit of the said Shotswell.

In the event that you should fail to produce the originals of the documents, letters and affidavits herein called for plaintiff will offer secondary evidence as to the contents of the same.

H. G. FITCH and HAYDEN, LANGHORNE & METZGER, Attorneys for Plaintiff.

[Endorsed]: Mar. 4, 1922. [99]

Decisions of the Court.

The COURT.—I think I am as well prepared to decide this case now as I would be if I should take such odd times as I can take from other work to peruse the depositions and study the record in the case further, and that is all that I would be able to do if I did not decide it now. It might be more satisfactory to sit down and take this record and go through it thoroughly again uninterruptedly in the court's chambers or closet, but it can't be done.

Regarding the law of the case it appears to me that there is this distinction between the question

of suicide as it ordinarily comes up in these cases and in this case; In the ordinary case where suicide is considered, the presumption that a man did not kill himself, that is where his death is proven, the presumption that he died by some other means than his own hand intentionally used against himself stands out without anything to take from it. but in this case the court is asked to choose between the theory that he destroyed himself physically by his own act and the theory that he banished himself from his friends and relatives forever and became a wanderer and a tramp on the face of the earth, constantly on the alert, scanning every face for some look of recognition. You say he was a longheaded man. If he was he must have known that was the fate that awaited him if he fled.

The importance of just what was in his mind and what his circumstances were cannot be overestimated in determining just what he did and to understand the actions that witnesses have testified to testifying on his part. [100] Now the fact that he was in trouble and had been in trouble for a long time might make him a fugitive or might make him a suicide. That does not get the court or anyone else very far in determining just what he did. His conduct on that morning in parting from his family I interpret that he had not vet made up his mind to commit suicide, though he had been thinking of it. Hope is very strong in every one. After he learned at Portland or after this bank examiner or officer Hay left him there and after he learned that the bank was closed, I think he began, in addition to his other motives, thinking of suicide, and possibly thinking of the alternative of escape, that he then began to fear arrest, whether rightly or whether he deserved arrest or whether he did not. What the court looks for is what the condition of his mind was. He probably got to thinking that is what Hay had gone back for, to close the bank and get out papers for his arrest. Therefore when he left the hotel he probably intended, just as defendant's counsel have argued, to go down the river, but he took a taxi for the Union Station so that if inquiry was made after he had left by anyone seeking his arrest they should be thrown off the scent to that extent temporarily.

If, as defendants' counsel have argued, he was seeking to act strangely and attract attention he would not have stopped outside the Union Station, out there in the dark, where the porter alone saw him. He would have paraded himself through the corridors of the station I take it. Evidently he thought there might be some one in the station he would not want to meet. He went to take the train down the river. As I conclude, possibly he had not yet made up his mind to commit suicide. A man would naturally [101] put it off as long as he could unless he was suddenly overcome with an impulse. It is not exactly clear about his conduct on that trip down the river to the court, but when you say that he was laying the foundation for his flight, but to create the impression that he committed suicide, probably a man who is going to commit suicide for the benefit of those he leaves behind

him, he may dread if he takes the step that he may be rescued when he doesn't want to be rescued, and yet he wants to make it so sure that there will be witnesses that he did kill himself that he wants to have it done under circumstances where he will not only not be immediately rescued, say he determined to drown himself, but that a sufficient number of witnesses will know that that was the only way that he could have disappeared. Therefore the fact that he did many things on the trip down to attract attention to himself weighs about as much one way as the other. That is he wanted everybody to recognize him so that each step could be traced, whichever motive was in his mind. That conduct would be about as natural in one case as the other.

His getting on the boat and his conduct from there on seems to the court the more reasonable explanation of it is that it was suicide, because whatever did happen he could not have anticipated that that is the way it would turn out. He knew he was a marked man, he knew the bank was closed, knew they were all watching him, knew or probably felt that he would be followed up, his motions on the boat. Shotswell who collected his fare did not collect it when he collected it from others and he stood there watching him. So when he went out the rear of the boat he would feel that [102] that he probably would be followed within a half a minute; he could not know he would not immediately be followed out there and could hang on the side of the boat in perfect security, that no one was thinking of him and no one on the boat had him in the least in their minds. He must have felt they were all thinking about him more or less, whether they were or not.

This conduct such as his has been studied by dramatists and novelists and I think that his reasoning, his emotions and his actions probably pictured by that of Oily Gammon and John Carker, and this writing of letters and making appointments and having his car fixed, arranging for it in Portland, and all those thingse are old symptoms and actions of men who are contemplating destroying themselves. If he contemplated flight to southern California he never would have mentioned his wife going to his father in California and he never would have talked with the garage man about his taking a trip to California. If he was going to run the other way he might have done so. The court cannot conceive that a man as well known as he apparently was and living as near Portland as he did would ever flee from Kalama and take that night train for California. It might happen three times out of four that he would not see anybody on that train that he would know, but he would feel that every train that he got on between Portland and California would be full of people he would know.

Again the use by him, if he contemplated flight, of a life-preserver, if he had any confederate, and the court finds nothing in this case to justify a suspicion that he [103] could have had a confederate, things moved so fast from the time that Hay came, the night before. When he went to Portland,

as I have found, he still was strong in hope that he. might get through, and therefore I cannot find any opportunity for confederation or any-not opportunity, but any incentive to be formulating a plot to build up a suicide theory at Kalama. That is before he went to Portland. If in the afternoon at Portland such a thing came into his mind, how is the Court to find anything to base a conclusion on that he had the opportunity to do it. He could not with five men on the boat and he knew not how many at the landing, a lighted landing, what hope whether he did in fact go up there without anybody seeing him, he could not hope to do so; he could not know in his own mind that it would turn out that way. If he was tortured with a fear of discovery, why, he would think that everybody was looking for him and many people down there that he would have to run the gauntlet of as he went up that slip.

About the men Mr. Shotswell and Mr. Reid, the Court concludes that in the flight of time, talking about this many times and thinking about it many times, this man that they testified to having gone over across the tracks there between them each one probably saw the other and what they think they recollect about that is either Mr. Shotswell has confused Mr. Reid with that man that went up there or with some of the others who followed later. What leads me to that conclusion is this: that it was very apparent that Mr. Shotswell wanted to get that man as far from him as he could down toward Mr. Reid and Mr. Reid seemed equally inclined to get him up as close to Shotswell as he could. [104]

Mr. LANGHORNE.—Chisholm.

The COURT.—Chisholm, yes. Mr. Reid had him almost up there going across where Chisholm went across and Mr. Chisholm had him almost back as far as Reid was standing. This matter of the automobile, this court has tried so many cases where there were automobiles acting strangely down in that country for other reasons than people running away that were insured that, even if that automobile was acting strangely, the Court does not associate it particularly with Mr. Stewart.

There is more difficulty so far as the court is concerned with the fact that the body is not recovered and Mr. Elwood. Is that the man's name?

Mr. KEENAN.—Yes.

The COURT.—But his body was not recovered and other bodies have not been recovered. If he was building up a proposition that he wanted to leave the impression that he had drowned himself when he hadn't—men often leave their clothes on the bank of the river or hat or something—it would not have been very difficult for Mr. Stewart to have provided himself with some package that would have floated that might have been found, if he was a very longheaded man.

Regarding Mr. Elwood's testimony, aside from the fact that I have pointed out that one of the last things in the world Mr. Stewart would have done is to have taken immediately a train for California, is this: What he would necessarily had to have done to have reached Hanford by the 20th. It was physically possible, but undoubtedly the railroad men on the train that he must have taken would [105] have seen him, if he had tied to hide in a stateroom so that he would not see anybody that he might know the porters on the train would have remembered it, and if he did move freely about the train others he probably knew would have seen him. The Court concludes that Mr. Elwood did see somebody at Hanford on the 20th that he thought was Stewart. Why I think it was the 20th is this: that Mr. Elwood said it was the 22d of February; he said it was a holiday, when the restaurants and barber shops were open. Well, the 20th, as I looked at the calendar, appeared to be Sunday and probably there would be only a few places open on Sunday. But all of these witnesses that have seen men that they thought—testified was Fred Stewart —It must be true that in everyone's life they have had experience when they mistook one person for another, but what I presume people in thinking about cases of mistaken identity do not sufficiently take into account is this: That you pass a person on the street and you are mistaken about who he is. There is nothing to call to your attention ordinarily the fact that you are mistaken. You go on thinking that he is the man you met. In the humdrum ordinary existence of an individual nothing comes to view to correct your mistake. Therefor out of all the people on the Pacific Coast, when a man that was well known, prominently known, to many people, suddenly disappears it is not at all extraordinary that within the course of several months among the people who knew him may be

found people that thought they had seen him after the event, that is taking into account the fact that the event that has disappeared has not been called to their attention [106] until after the time that they thought they saw him. In such case as that the proof, to overcome this well-known fact or facts that when thought about must be realized, would have to be a much more positive identification than anything that has occurred in this case. People seeing one another in passing automobiles or seeing one pass in an automobile or seeing one on a sidewalk when they are riding by in an automobile certainly falls far short of what is necessary. And the man who claims to have him on the sidewalk he did not speak to him. very fact that he did not speak to a man whom he knew, meeting him away from home, goes a long way to convince the court that the recognition dwells more in memory than was actual at the time.

From his conduct on the boat it appears to me that he had not probably until the last moment made up his mind to actually commit suicide. I do not need to be told that he did not sleep the night before and he had been driving hard all day, while he was in Portland trying to find a way out, and then when Hay left him going on with his writing and other activities, and getting on the train and that did not go fast enough and getting an automobile and driving that, and probably the first time he slowed up or tried to slow up was after he got on the bow of that boat, and he could not do it.

Judgment for plaintiff.

Mr. RUPP.—In order that the record may be kept correct, you deny my motion to dismiss, I except and you allow an exception.

The COURT.—Motion denied and exception allowed. [107]

No. 3436.

Findings of Fact and Conclusions of Law Proposed by Defendant.

The above-entitled cause came on regularly for trial on April 4, 1922, before the undersigned judge of the United States District Court, for the Western District of Washington, a trial by jury having been waived by written stipulation of the parties, the same being filed in this cause, plaintiff appearing in person and by her attorneys H. G. Fitch, Hayden, Langhorne & Metzger, and the defendant appearing by S. A. Keenan, one of its counsel, and all things being regularly the trial of said cause was continued from day to day until its completion April 11, 1922, and after duly considering all the evidence offered and the argument of respective counsel the court makes the following:

FINDINGS OF FACT.

I.

That at the time of the commencement of this action and at all times since, and for some years prior thereto, the plaintiff, Maude E. Stewart, was a citizen of the State of [108] Washington, residing at Kelso, Cowlitz County, within the Southern

Division of the Western District of the State of Washington.

II.

That on and prior to the 17th day of April, 1917, the defendant, The Prudential Insurance Company of America, was and is now a corporation duly organized and existing under and by virtue of the laws of the state of New Jersey, and was and is a resident and citizen of that state. And on the date last above mentioned and at all times since, has been admitted to do business in the state of Washington, having complied with the laws of the state of Washington, relative to foreign corporations transacting business therein.

III.

That the matter and amount in the above-entitled action exceed, exclusive of costs and interest, the sum or value of \$3,000.

IV.

The Court finds that the insurance policies, as set out in the pleadings of this case, were duly and regularly issued, and in full force and effect, on March 17, 1921.

V.

The Court finds that the plaintiff failed to furnish defendant with due and sufficient, or any other proof of the death of the insured prior to the commencement of this action.

VI.

The Court finds that the plaintiff has wholly failed to establish the death of the insured named in said policies or either of them. [109]

From the foregoing findings of fact the Court makes the following:

CONCLUSIONS OF LAW.

I.

That said action was prematurely brought upon the ground and for the reason that defendant was not furnished with sufficient, or any, proof of the death of the insured prior to the bringing of this action.

II.

That defendant is entitled to a judgment of dismissal with prejudice for the reason and upon the ground that plaintiff has wholly failed to establish by evidence the death of said insured.

Done in open court this 24th day of April, 1922, at the city of Tacoma, Washington.

Judge.

The foregoing proposed findings of fact and conclusions of law were duly presented to, and considered by, the court prior to the signing of the findings of fact and conclusions of law in favor of the plaintiff. Defendant's counsel at the time duly excepted to the court's refusal to adopt the proposed findings in favor of the defendant and an exception to said ruling is herby allowed the defendant.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Apr. 24, 1922. [110]

No. 3437.

Findings of Fact and Conclusions of Law Proposed by Defendant.

The above-entitled cause came on regularly for trial on April 4, 1922, before the undersigned judge of the United States District Court for the Western District of Washington, a trial by jury having been waived by written stipulation of the parties, the same being filed in this cause, plaintiff appearing in person and by her attorneys, H. G. Fitch, Hayden, Langhorne & Metzger, and the defendant appearing by Chadwick, McMicken, Ramsey & Rupp, its counsel, and all things being regular, the trial of said cause was continued from day to day until its completion on the 11th day of April, 1922, and after duly considering all the evidence offered and the argument of respective counsel the Court makes the following

FINDINGS OF FACT.

Τ.

That at the time of the commencement of this action and at all times since and for some years prior thereto the plaintiff, Maude E. Stewart, was a citizen of the State of Washington residing at Kelso, Cowlitz County within the southern division of the Western District of the State of [111] Washington.

II.

That on and prior to the 17th day of April, 1917, the defendant, The Mutual Life Insurance Company of New York was and is now a corporation

duly organized and existing under and by virtue of the laws of the State of New York, and was and is a resident and citizen of that State. And on the date last above mentioned and at all times since, has been admitted to do business in the State of, Washington, having complied with the laws of the State of Washington relative to foreign corporations transacting business therein.

III.

That the matter and amount in the above-entitled action exceed, exclusive of costs and interest, the sum or value of three thousand dollars (\$3,000.00).

IV.

The Courts find that the insurance policies, as set out in the pleadings of this case, were duly and regularly issued and in full force and effect, on March 17, 1921.

V.

The Court finds that the plaintiff failed to furnish defendant with due proof of the death of the insured prior to the commencement of this action.

VI.

The Court finds that the plaintiff has wholly failed to establish the death of the insured named in said policies or either of them.

From the foregoing findings of fact the Court makes [112] the following

CONCLUSIONS OF LAW.

I.

That said action was prematurely brought upon the ground and for the reason that defendant was not furnished with due proof of the death of the insured prior to the bringing of this action.

II.

That defendant is entitled to a judgment of dismissal with prejudice for the reason and upon the ground that plaintiff has wholly failed to establish by evidence the death of said insured.

Done in open court this 24th day of April, 1922, at the City of Tacoma, Washington.

Judge.

The foregoing proposed findings of fact and conclusions of law were duly presented to and considered by the Court prior to the signing of the findings of fact and conclusions of law in favor of the plaintiff. Defendant's counsel at the time duly excepted to the court's refusal to adopt the proposed findings in favor of the defendant and an exception to said ruling is hereby allowed the defendant.

EDWARD E. CUSHMAN,

Judge. [113]

[Endorsed]: Apr. 24, 1922. [114]

No. 3436.

Findings of Fact and Conclusions of Law.

Came on this cause to be heard on April 4, 1922, before the undersigned Judge of the United States District Court for the Western District of Washington, a trial by jury having been waived by stipu-

lation of the parties, which stipulation was filed among the records of this action, the plaintiff appearing in person and by her attorneys H. G. Fitch and Hayden, Langhorne & Metzger, and the defendant appearing by S. A. Keenan, Esq., its attorney.

Testimony both oral and documentary was introduced by the respective parties and the trial of said cause was continued from day to day until April 11, 1922, when the testimony was closed and the case was argued by respective counsel, and the Court being at the time fully advised in the premises, DOTH ORDER judgment for the plaintiff for the full amount sued for in the complaint, and hereby makes and files the following

FINDINGS OF FACT.

That at the time of the commencement of this action [115] and at all times since, and for some years prior thereto, the plaintiff Maude E. Stewart was a citizen of the State of Washington, residing at Kelso, Cowlitz County, within the Southern Division of the Western District of the State of Washington.

II.

That on and prior to the 17th day of April, 1917, the defendants The Prudential Insurance Company of America, was and is now a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and was and is a resident and citizen of that state. And on the date last above mentioned and at all times since, has been admitted to do business in the state of Washington, having complied with the laws of the state of Wash-

ington relative to foreign corporations transacting business therein.

III.

That the matter and amount in the aboveentitled action exceed, exclusive of costs and interest, the sum or value of \$3,000.

IV.

I find that on the 17th day of April, 1917, the defendant, The Prudential Insurance Company of America, an insurance corporation, in consideration of an annual premium of \$749.50, paid to it by Frederick L. Stewart, then a resident of Kelso, Cowlitz County, Washington, made, executed and delivered to the said Frederick L. Stewart their certain policy of insurance, a copy of which is annexed to the complaint and marked Exhibit "A," the original of which was offered and received in evidence on the trial of this action and marked Plaintiff's Exhibit —, wherein and whereby the said The Prudential Insurance Company of America, a corporation, [116] as aforesaid, promised and agreed that it would upon receipt of due proof of the death of the said Frederick L. Stewart during the continuance of the policy so issued, pay to Maude E. Stewart, the beneficiary named therein, who was then the wife of the insured, the sum of \$25,000.

V.

I find that on the 17th day of March, 1921, the policy so issued by the defendant The Prudential Insurance Company of America to the said Frederick L. Stewart, was in full force and effect, the

last annual premium having been paid thereon and accepted by the company and a receipt issued therefor.

VI.

That on the 17th day of August, 1915, the defendant The Prudential Insurance Company of America, in consideration of an annual premium of \$138.95, paid to it by Frederick L. Stewart, then of Kelso, Cowlitz County, Washington, made, executed and delivered their certain policy of insurance in writing of which a copy is annexed to the complaint filed herein, marked Exhibit "B," the original of which was introduced upon the trial of this action, marked Plaintiff's Exhibit -, wherein and whereby it insured the life of the said Frederick L. Stewart in the sum of \$5,000 and agreed, in the event of the death and upon receipt of due proof thereof during the continuance of the policy, to pay to Maude E. Stewart, the beneficiary, then the wife of the insured, the sum of \$5,000.

VII.

That on the 17th day of March, 1921, the last described policy of insurance so issued by The Prudential Insurance Company of America, in the sum of \$5,000 on the [117] life of the said Frederick L. Stewart, was in full force and effect, the last annual premium having been paid thereon, the amount thereof received by the company and a receipt issued therefor.

VIII.

The Court finds that on the 7th day of August, 1916, the defendants The Prudential Insurance

Company of America, a corporation, in consideration of an annual premium of \$144.25, paid to it by Frederick L. Stewart, then a resident of Kelso, Cowlitz County, Washington, made, executed and delivered to him its certain policy of insurance, a copy of which is attached to the complaint filed in this action, marked Exhibit "C," the original of which was offered and received in evidence upon the trial of this action, wherein and whereby said defendant The Prudential Insurance Company of America, a corporation, insured the life of the said Frederick L. Stewart in the sum of \$5,000, and agreed to pay that amount to Maude E. Stewart, then the wife of the said Frederick L. Stewart, upon receipt of due proof of the death of the insured during the continuance of the policy.

IX.

That on the 17th day of March, 1921, said policy of insurance described in the foregoing finding was in full force and effect, the last annual premium having been paid thereon, the amount having been received by the company and a receipt issued therefor.

Χ.

The Court finds that on the 17th day of March, 1921, between the hour of 8:50 and 9:15 P. M. of said day, the said Frederick L. Stewart met his death by being drowned in the waters of the Columbia River. [118]

XI.

That thereafter the plaintiff in this action, being the beneficiary named in the three policies of insur-

ance so issued by the defendant The Prudential Insurance Company of America on the life of the said Frederick L. Stewart, made due proof of the death of Frederick L. Stewart, the insured, and sent said proofs to the Home Office of The Prudential Insurance Company of America, a corporation, the defendant, at its Home Office in Newark, New Jersey. That the proofs of death so submitted by the said plaintiff to the defendant concerning the death of the said Frederick L. Stewart were sufficient to enable the said defendant to consider its rights and liabilities. That the last affidavit submitted by the plaintiff in support of her claim of the death of the said Frederick L. Stewart was received by the defendant at its Home Office in Newark, New Jersey, on the 12th day of June, 1921.

XII.

That the said defendant The Prudential Insurance Company of America, a corporation, thereafter denied that the said Frederick L. Stewart was dead and by its answer filed herein, joined issue with the plaintiff on the allegation concerning the death of the said Frederick L. Stewart.

From the foregoing findings the Court hereby makes and adopts the following

CONCLUSIONS OF LAW.

I.

That the Court has full and complete jurisdiction of the parties and of the subject matter of this action. [119]

TT.

That the plaintiff is entitled to a judgment

against the defendant The Prudential Insurance Company of America, a corporation, in the sum of \$35,000, together with interest thereon at the rate of six per cent per annum from and after June 12, 1921.

III.

That the plaintiff is also entitled to a judgment for her costs and disbursements expended in this action, which will be taxed in the manner provided for by law.

Done in open court this 24th day of April, 1922. EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Apr. 24, 1922. [120]

No. 3437.

Findings of Fact and Conclusions of Law.

Came on this cause to be heard on April 4, 1922, before the undersigned Judge of the United States District Court for the Western District of Washington, a trial by jury having been waived by stipulation of the parties, which stipulation was filed among the records of this action, the plaintiff appearing in person and by her attorneys H. G. Fitch and Hayden, Langhorne & Metzger, and the defendant appearing by Chadwick, McMicken, Ramsey & Rupp, its attorneys.

Testimony both oral and documentary was introduced by the respective parties and the trial of said cause was continued from day to day until April 11,

1922, when the testimony was closed and the case was argued by respective counsel, and the court being at the time fully advised in the premises, DOTH ORDER judgment for the plaintiff for the full amount sued for in the complaint, and hereby makes and files the following

FINDINGS OF FACT.

I.

That at the time of the commencement of this action and at all times since, and for some years prior thereto, [121] the plaintiff Maude E. Stewart was a citizen of the State of Washington, residing at Kelso, Cowlitz County, within the Southern Division of the Western District of the State of Washington.

II.

That on and prior to the 15th day of July, 1915, the defendant The Mutual Life Insurance Company of New York was and is now a corporation duly organized and existing under and by virtue of the laws of the state of New York, and was and is a resident and citizen of that state. And on the date last above mentioned and at all times since, has been admitted to do business in the state of Washington, having complied with the laws of the state of Washington relative to foreign corporations transacting business therein.

III.

That the matter and amount in the above entitled action exceed, exclusive of costs and interest, the sum or value of \$3,000.

IV.

I find that on the 15th day of July, 1915, the defendant The Mutual Life Insurance Company of New York, an insurance corporation, in consideration of an annual premium of \$179.20, paid to it by Frederick L. Stewart, then a resident of Kelso. Cowlitz County, Washington, made, executed and delivered to the said Frederick L. Stewart their certain policy of insurance, a copy of which is annexed to the complaint and marked Exhibit "A.", the original of which was offered and received in evidence on the trial of this action and marked Plaintiff's Exhibit —, wherein and whereby the said The Mutual Life Insurance Company of New York, a corporation [122] as aforesaid, promised and agreed that it would upon receipt of due proof of the death of the said Frederick L. Stewart during the continuance of the policy so issued, pay to Maude E. Stewart, the beneficiary named therein, who was then the wife of the insured, the sum of \$5,000.

V.

I find that on the 17th day of March, 1921, the policy so issued by the defendant The Mutual Life Insurance Company of New York to the said Frederick L. Stewart, was in full force and effect, the last annual premium having been paid thereon and accepted by the company and a receipt issued therefor.

VI.

That on the 28th day of July, 1915, the defendant The Mutual Life Insurance Company of New York, in consideration of an annual premium of \$179.20, paid to it by Frederick L. Stewart, then of Kelso, Cowlitz County, Washington, made, executed and delivered their certain policy of insurance in writing, of which a copy is annexed to the complaint filed herein, marked Exhibit "B," the original of which was introduced upon the trial of this action, marked Plaintiff's Exhibit —, wherein and whereby it insured the life of the said Frederick L. Stewart in the sum of \$5,000 and agreed, in the event of the death and upon receipt of due proof thereof during the continuance of the policy, to pay to Maude E. Stewart, the beneficiary, then the wife of the insured, the sum of \$5,000.

VII.

That on the 17th day of March, 1921, the last described policy of insurance so issued by The Mutual Life Insurance Company of America, in the sum of \$5,000 on the life of the said Frederick L. Stewart, was in full force [123] and effect, the last annual premium having been paid thereon, the amount thereof received by the company and a receipt issued therefor.

VIII.

The Court finds that on the 17th day of March, 1921, between the hour of 8:50 and 9:15 P. M. of said day, the said Frederick L. Stewart met his death by being drowned in the waters of the Columbia River.

IX.

That thereafter the plaintiff in this action, being the beneficiary named in the two policies of insurance so issued by the defendant The Mutual Life Insurance Company of America on the life of the said Frederick L. Stewart, made due proof of the death of Frederick L. Stewart, the insured, and sent said proofs to the Home Office of The Mutual Life Insurance Company of New York, a corporation, the defendant, at its Home Office in the City of New York, and State of New York. That the proofs of death so submitted by the said plaintiff to the defendant concerning the death of the said Frederick L. Stewart were sufficient to enable the said defendant to consider its rights and liabilities. That the last affidavit submitted by the plaintiff in support of her claim of the death of the said Frederick L. Stewart was received by the defendant at its Home Office in New York, New York, on the 13th day of June, 1921.

XII.

That the said defendant The Mutual Life Insurance Company of New York, a corporation, thereafter denied that the said Frederick L. Stewart was dead and by its answer filed herein, joined issue with the plaintiff on the allegation concerning the death of the said Frederick L. Stewart. [124]

From the foregoing findings of fact the Court hereby makes and adopts the following

CONCLUSIONS OF LAW.

I.

That the court has full and complete jurisdiction of the parties and of the subject matter of this action.

II.

That the plaintiff is entitled to a judgment against the defendant The Mutual Life Insurance Company of New York, a corporation, in the sum of \$10,000 together with interest thereon at the rate of six per cent per annum from and after June 12, 1921.

III.

That the plaintiff is also entitled to a judgment for her costs and disbursements expended in this action, which will be taxed in the manner provided for by law.

Done in open court this 24th day of April, 1922. EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Apr. 24, 1922. [125]

No. 3436.

Exceptions to Plaintiff's Proposed Findings of Fact and Conclusions of Law.

I.

Defendant excepts to finding of fact 10, upon the ground and for the reason that there is no evidence to the support of said findings.

II.

Defendant excepts to finding of fact 11, upon the ground and for the reason that due and sufficient proof of death was never furnished to the defendant under the terms and conditions of either of the said policies mentioned in said findings of fact.

III.

Defendant excepts to each and all of said findings

which find that the defendant is liable to plaintiff in any manner whatsoever under the terms and conditions of said policies or any of them.

IV.

Defendant excepts to conclusions of law 2. [126] V.

Defendant excepts to Conclusion of Law 3.

Dated at Seattle, Washington, this 24th day of April, 1922.

S. A. KEENAN, S. V. CAREY,

Attorneys for Defendant.

The foregoing exceptions to the findings of fact and conclusions of law were duly and regularly presented to the court, prior to the adoption of the findings and conclusions filed in this case. Said exceptions are disallowed and the defendant at the time is allowed an exception.

Dated at Tacoma, Washington, April 24, 1922. EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Apr. 24, 1922. [127]

No. 3437.

Exceptions to Plaintiff's Proposed Findings of Fact and Conclusions of Law.

I.

Defendant excepts to finding of fact 8 upon the ground and for the reason that there is no evidence to support said finding.

II.

Defendant excepts to finding of fact 9 upon the ground and for the reason that due proof of death was never furnished to the defendant under the terms and conditions of either of the said policies mentioned in said findings of fact.

III.

Defendant excepts to conclusion of law No. 2.

TV.

Defendant excepts to conclusion of Law 3.

Dated at Tacoma, Washington this 24 day of April, 1922.

CHADWICK, McMICKEN, RAMSEY & RUPP,

Attorneys for Defendant. [128]

The foregoing exceptions to the findings of fact and Conclusions of Law were duly and regularly presented to the Court, prior to the adoption of the Findings and Conclusions filed in this case. Said exceptions are disallowed and the defendant at the time is allowed an exception.

Dated at Tacoma, Washington, April 24th, 1922. EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Apr. 24, 1922. [129]

No. 3436.

Judgment.

This cause having been brought on for trial on the 4th day of April, 1922, before the undersigned United States District Judge for the Western District of Washington, a trial by jury having been waived by stipulation duly signed by respective counsel, which stipulation is filed among the records of this action, the plaintiff appearing in person and by her attorneys H. G. Fitch and Hayden, Langhorne & Metzger, the defendant appearing by its attorney S. A. Keenan.

After the introduction of testimony, both oral and documentary on behalf of both parties, the hearing of said cause was concluded on the 11th day of April, 1922, and the Court having made and filed its findings of fact and conclusions of law, from all of which it appears that the plaintiff is entitled to a judgment against the defendant, The Prudential Insurance Company, in the sum of \$35,000, together with interest thereon at the rate of six per cent per annum from the 12th day of June, 1921, and to her costs and disbursements of this action. [130]

WHEREFORE, by reason of the law in the premises,

IT IS NOW ORDERED, ADJUDGED AND DECREED, and this does ORDER, ADJUDGE AND DECREE, that the plaintiff be and she is hereby awarded a judgment against the said defendant, The Prudential Insurance Company of America, a corporation, in the sum of \$35,000, together with interest thereon at the rate of six per cent per annum from the 12th day of June, 1921, and to her taxable costs and disbursements of this action, and that execution issue therefor.

To the foregoing judgment and to the whole thereof the defendant at the time excepted and its exception is hereby allowed and noted of record.

Done in open court this 24th day of April, 1922.

EDWARD E. CUSHMAN.

DWARD E. CUSHMAN,

Judge.

[Endorsed]: Apr. 24, 1922. [131]

No. 3437.

Judgment.

This cause having been brought on for trial on the 4th day of April, 1922, before the undersigned United States District Judge for the Western District of Washington, a trial by jury having been waived by stipulation duly signed by respective counsel, which stipulation is filed among the records of this action, the plaintiff appearing in person and by her attorneys H. G. Fitch and Hayden, Langhorne & Metzger, the defendant appearing by its attorneys Chadwick, McMicken, Ramsey & Rupp;

After the introduction of testimony, both oral and documentary on behalf of both parties, the hearing of said cause was concluded on the 11th day of April, 1922, and the court having made and filed its findings of fact and conclusions of law, from all of which it appears that the plaintiff is entitled to a judgment against the defendant The Mutual Life Insurance Company of New York, in the sum of \$10,000, together with interest thereon at the rate of six per cent per annum from the 12th day of

June, 1921, and to her costs and disbursements of this action,

WHEREFORE, by reason of the law in the premises,

IT IS NOW ORDERED, ADJUDGED AND DECREED, and this [132] does ORDER, ADJUDGE AND DECREE that the plaintiff be and she is hereby awarded a judgment against the said defendant The Mutual Life Insurance Company of New York, a corporation, in the sum of \$10,000, together with interest thereon at the rate of six per cent per annum from the 10th day of July, 1921, and to her taxable costs and disbursements of this action, and that execution issue therefor.

To the foregoing judgment and to the whole thereof the defendant at the time excepted and its exception is hereby allowed and noted of record.

Done in open court this 24th day of April, 1922. EDWARD E. CUSHMAN.

Judge.

Due service of the within and foregoing proposed judgment by receipt of a true copy thereof, together with true copies of the exhibits recited therein as being attached thereto, hereby is admitted in behalf of all parties entitled to such service by law or by rules of court, this 13th day of April, 1922.

CHADWICK, McMICKEN, RAMSEY & RUPP,

Attorneys for Deft.

[Indorsed]: Apr. 24, 1922. [133]

No. 3436—No. 3437.

Stipulation Extending Time to and Including May 27, 1922, to File Bill of Exceptions.

It is hereby stipulated and agreed by and between the parties to the above-entitled action, through their respective counsel, that the time in which to file a proposed bill of exceptions, by defendants, in the above-entitled causes, may be extended up to and including the 27th day of May, 1922, during which time said defendants, if they so elect, shall file their petition for a new trial.

Dated April 12, 1922.

H. G. FITCH and
HAYDEN, LANGHORNE & METZGER,
Attorneys for Plaintiff.
S. A. KEENAN,
STEPHEN V. CAREY,
CHADWICK, McMICKEN, RAMSEY
& RUPP,

Attorneys for Defendants.

Order Extending Time to and Including May 27, 1922, to File Bill of Exceptions.

UPON READING AND CONSIDERING the foregoing stipulation it is hereby ordered that the time in which to file a proposed bill of exceptions, by defendants, in this case, as well as the time in which to file their petition for a new trial is hereby [134] enlarged and extended up to and including May 27th, 1922.

Dated at Tacoma, Washington, April 15th, 1922. EDWARD E. CUSHMAN, Judge.

[Indorsed]: Apr. 15, 1922. [135]

No. 3436-No. 3437.

Stipulation Extending Time to and Including June 14, 1922, to File Bill of Exceptions.

It is hereby stipulated and agreed by and between the parties to the above-entitled actions, through their respective counsel, that the time in which to file a proposed bill of exceptions, by defendants, in the above-entitled causes, shall be extended up to and including the 14th day of June, 1922.

Dated May 26, 1922.

H. G. FITCH and HAYDEN, LANGHORNE & METZGER, Attorneys for Plaintiff in Said Actions. S. A. KEENAN,

CHADWICK, McMICKEN, RAMSEY & RUPP,

Attorneys for Defendants in Said Actions.

[Indorsed]: May 27, 1922. [136]

No. 3436—No. 3437.

Order Extending Time to and Including June 14, 1922, to File Bill of Exceptions.

Upon reading and considering the stipulation of the parties to said actions this day filed herein, it is hereby ORDERED that the time in which to file a proposed bill of exceptions by defendants in said actions, is hereby enlarged and extended up to and including June 14, 1922.

Dated at Tacoma, Washington, May 27th, 1922. EDWARD E. CUSHMAN,

Judge.

[Indorsed]: May 27, 1922. [137]

No. 3436—No. 3437.

Motion of Defendants for Settlement of Bill of Exceptions.

Come now the defendants in the above-entitled causes and move the Court that the proposed bill of exceptions agreed upon by all parties to this suit and delivered to the Clerk of this Court on June 14, 1922, for its settlement and certification, be now settled by the Court with the proper certificate thereto annexed. That said motion will be based upon all the papers and files in said cause, the rules of the Court as well as the affidavits of Otto B. Rupp and J. E. Peterson of counsel for defendants.

Dated at Seattle, Washington, this 26th day of July, 1922.

S. A. KEENAN,
CHADWICK, McMICKEN, RAMSEY
& RUPP,

Attorneys for Defendants. [138]

No. 3436-No. 3437.

Affidavit of Otto B. Rupp.

State of Washington, County of King,—ss.

Otto B. Rupp, being first duly sworn on oath, deposes and says: I am of counsel for the defendants in the above-entitled causes: that the trial of the above-entitled causes terminated on April 11, 1922; that on April 12, 1922, an order was duly entered extending the time in which to propose a bill of exceptions therein to May 26, 1922; that on May 26, 1922, another order was duly entered extending said time to and including June 14, 1922; that the reporter's transcript of testimony, consisting of 672 pages, was bound in two separate volumes. It was determined by counsel for defendants, in the preparation of the proposed [139] bill of exceptions, to condense the reporter's transcript by the elimination of all redundant and immaterial matter by setting down the testimony in narrative form so far as practicable. For the accomplishment of that and to divide the labor, I undertook to reduce the first volume to the proper form and Mr. Keenan undertook to reduce the other volume of the testimony to the proper form, all of which was done as expeditiously as possible, the same being completed on or about May 26, 1922. On that day, I took the proposed bill of exceptions, as thus prepared, together with the Court Reporter's entire transcript, to Mr. Lang-

horne at Tacoma, stating that I was not serving it upon him then because I wished him to examine the proposed bill as we had prepared it and if it met with his approval we would deliver it to the Clerk as an agreed bill of exceptions. To this Mr. Langhorne agreed. A few days thereafter, Mr. Langhorne telephoned me that he was satisfied with that part of the testimony which I had placed in condensed form, but was dissatisfied with the portion that Mr. Keenan had prepared; he then suggested that either he or I take the second volume which Mr. Keenan had treated, and place it in condensed form. He said that he was willing to do so, and I told him to do it. On June 6, 1922, Mr. Langhorne called upon me and stated that he desired to make two minor corrections in the portion of the proposed bill which I had prepared, which corrections he immediately made with my approval, and he also stated that he desired to have inserted in that part of the proposed bill I had prepared, copies of the two letters which are plaintiff's Exhibits Nos. 16 and 17 and I agreed to such insertion and they were then inserted as requested. He then stated that he had made extensive changes in the portion of the work which [140] had been done by Mr. Keenan; that in general he had left the direct examination of the witnesses as Mr. Keenan had it, but that he had placed in narrative form, so far as practicable, that portion of the testimony comprised in the cross-examination of all the witnesses whose testimony is found in the second volume of the reporter's transcript. Mr. Langhorne asked me

to look over that which he had done, and stated that if the same was satisfactory to defendants' counsel he then would agree to the proposed bill of exceptions as thus corrected and amended by him. I immediately sent to Mr. Keenan the proposed bill of exceptions as corrected and added to by Mr. Langhorne for Mr. Keenan's inspection and approval. A few days thereafter Mr. Keenan returned the proposed bill of exceptions, as thus amended and corrected, to me with his approval. On June 14, 1922, I caused the said proposed bill of exceptions prepared as aforesaid by Mr. Keenan and myself, and as amended as aforesaid by Mr. Langhorne, to be formally served on Mr. Langhorne at Tacoma, service thereof being duly admitted, and on the same date, June 14, 1922, I caused the said bill of exceptions, as so agreed between counsel for the respective parties, to be settled, to be delivered to the Clerk of the Court at Tacoma, Washington; that no amendments or additions or corrections thereto have ever been served upon any of counsel for defendants by any of counsel for plaintiff; that after the delivery of said proposed bill of exceptions to the clerk of the above-entitled court, neither I nor any of my associate counsel have received any notice or information from the clerk of the court of any [141] day or time being designated or fixed for the settling of said proposed bill of exceptions.

OTTO B. RUPP.

Subscribed and sworn to before me this 26th day of July, 1922.

[Notarial Seal] H. J. RAMSEY,
Notary Public in and for the State of Washington,
Residing at Seattle. [142]

No. 3436-No. 3437.

Affidavit of J. E. Peterson.

State of Washington County of King,—ss.

J. E. Peterson, being first duly sworn on oath, deposes and says: That I am lawver associated with the firm of Chadwick, McMicken, Ramsey & Rupp, counsel for the defendant Mutual Life Insurance Company of New York, a corporation; that on June 14, 1922, I took to Tacoma, Washington, a proposed bill of exceptions in the aboveentitled causes; that I first served such proposed bill upon Maurice A. Langhorne, one of the attorneys for plaintiff, who at the time stated to me that said proposed bill had been agreed to by counsel for the respective parties. After such service, I took said proposed bill to the office of the Clerk of the above-entitled Court and there delivered the same to said Clerk. That at [143] the time I delivered said bill to said Clerk, I stated to the Clerk that said bill had been agreed to by counsel for the respective parties and was ready for the attention of the Judge; that the Deputy Clerk then stated to me that the Judge was out of the city of Tacoma, but that she would call said proposed bill to his attention as soon as he returned to said city of Tacoma.

J. E. PETERSON.

Subscribed and sworn to before me this 26th day of July, 1922.

[Notarial Seal] H. J. RAMSEY,

Notary Public in and for the State of Washington, Residing at Seattle.

Copy of within motion and affidavits received, and due service of same acknowledged this 26th day of July, 1922.

HAYDEN, LANGHORNE & METZGER,
Attorneys for Plaintiff.

[Indorsed]: July 26, 1922. [144]

No. 3436—No. 3437.

Affidavit of Otto B. Rupp.

State of Washington County of King,—ss.

Otto B. Rupp, being first duly sworn on oath deposes and says:

That no notice having been heretofore given any of counsel for defendants of a time and place when and where the proposed bill of exceptions referred to in a certain affidavit made by him on July 26, 1922, in the above-entitled causes, would be settled and certified, he went on July 11, 1922, to the city of Tacoma; that shortly after his arrival he ascertained that Maurice A. Langhorne, one of counsel for plaintiff, was out of the city; that he then interviewed H. G. Fitch, one of counsel for plain-

tiff, and requested him to go with counsel for defendants before the court for the [145] purpose of securing the settlement by the court of the bill of exceptions in said causes; that thereupon said Fitch requested counsel for defendants that all action in the matter be deferred until the return to Tacoma of Mr. Langhorne from California, which return said Fitch stated would be in about two weeks; that no time having been thereafter fixed by the Court for settlement and certification of said proposed bill of exceptions, counsel for defendants on July 26, 1922, filed a motion in the above-entitled causes, requesting the court to settle and certify said proposed bill; that thereafter, to wit, on the 27th day of July, 1922, the clerk of said Court notified counsel for defendants that the Court had fixed July 31, 1922, for the hearing of said motion; that within one or two days prior to said July 31, 1922, said H. G. Fitch requested that the hearing on said motion be continued until August 7, 1922, on account of the continued absence of Mr. Langhorne from Tacoma; that thereafter counsel for defendants were advised that the Court had continued the hearing on said motion until August 5, 1922.

OTTO B. RUPP.

Subscribed and sworn to before me this 4th day of August, 1922.

[Notarial Seal]

H. J. RAMSEY,

Notary Public in and for the State of Washington, Residing at Seattle. [146] Copy of within affidavit received, and due service of same acknowledged this 5th day of August, 1922.

H. G. FITCH and HAYDEN, LANGHORNE & METZGER, Attorneys for Plaintiff.

[Endorsed]: Aug. 5, 1922. [147]

No. 3436-No. 3437.

Affidavit of H. G. Fitch.

United States of America, Western District of Washington, Southern Division,—ss.

H. G. Fitch, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled actions; that at all times since the judgment in said actions was signed and filed in the office of the Clerk of this court, and at all times since the bill of exceptions was filed in said cases under date of June 14, 1922, the Honorable Edward E. Cushman, Judge of this court, has been within the Western District of Washington, either at Tacoma or Seattle, and has at no time since said date been without the boundaries of said district, and has at all times since said date been continuously engaged in holding [148] court either in Tacoma or Seattle.

Further affiant sayeth not.

H. G. FITCH.

Subscribed and sworn to before me this 5th day of August, 1922.

[Notarial Seal] F. D. METZGER, Notary Public in and for the State of Washington, Residing at Tacoma.

Due service of the within and foregoing affidavit by receipt of a true copy thereof, together with true copies of the exhibits recited therein as being attached thereto, hereby is admitted in behalf of all parties entitled to such service by law or by rules of court, this 5th day of August, 1922.

> S. A. KEENAN, CHADWICK, McMICKEN, RAMSEY & RUPP.

Attorneys for Defendants. [Indorsed]: Aug. 5, 1922. [149]

No. 3436—No. 3437.

Bill of Exceptions.

BE IT REMEMBERED, that heretofore, to wit, on April 4, 1922, the above-entitled causes came regularly on for trial in the above court before the Honorable Edward E. Cushman, Judge of said court sitting without a jury, a stipulation in writing waiving a jury having been heretofore filed with the Clerk, the plaintiff appearing by Maurice A. Langhorne of Messrs. Hayden, Langhorne & Metzger, Mr. H. G. Fitch and Mr. A. H. Imus, her attorneys and counsel, and the defendants appearing

by Mr. S. A. Keenan, Mr. Otto B. Rupp of Messrs. Chadwick, McMicken, Ramsey & Rupp, Mr. O. B. Thorgrimson of Messrs. [150] Preston, Thorgrimson & Turner, and Mr. James H. Guest of counsel, their attorneys and counsel.

And thereupon the following proceedings were had and done, to wit:

The depositions of Walter H. Comber, K. Hanson, George Hedges, William Paul Koeper, F. C. Meyer, J. A. Moore, Orville Onorato, Spira Papalian, Arthur E. Pooley and Benjamin Vienna were ordered by the Court published.

Thereupon Mr. S. A. Keenan of counsel for defendants moved the Court for an order requiring that counsel for plaintiff state whether the death of Frederick L. Stewart was caused by suicide or accident.

It was thereupon stated by Mr. Maurice A. Langhorne of counsel for plaintiff that the case would be tried on the theory that said Stewart voluntarily ended his own life.

Testimony of Claude P. Hay, for Plaintiff.

CLAUDE P. HAY, being first duly sworn, testified on behalf of plaintiff as follows:

Direct Examination.

I now live at Sultan, Washington, where I first went in March, 1915. In March, 1921, I was bank commissioner of the State of Washington, and had held such position for about a year. I knew Fred L. Stewart of Kelso and had known him prior to March 17, 1921, for eight or ten years. He was

cashier of the Kelso State Bank at Kelso. I couldn't say how long he had been in the banking business, but quite a while. [151] He was engaged in that business ever since I was bank commissioner. I have known Louis Plamondon of Woodland for seven or eight years perhaps. He was the managing officer of the Woodland State Bank at Woodland. I am acquainted with George F. Plamondon and was acquainted with him in March, 1921. He was assistant cashier of the Kelso State Bank.

I went to Kelso on the evening of March 16, 1921, to determine what action should be taken in connection with the affairs of the Kelso State Bank. I cannot recall whether I heard from Louis Plamondon on that day or not, but he had written me concerning an investigation that he had made of the affairs of the Kelso State Bank. I don't have the original report which he made as the same would be in the files in the State Banking Department or possibly with the liquidating officer of the bank. The papers just handed me I think are correct copies of the originals.

So far as I am aware Stewart did not have any notice of my coming to Kelso on the evening of March 16, 1921. At least I did not give him any notice.

The COURT.—How old a man was Stewart?
Mr. LANGHORNE.—Stewart was forty-nine.

When I arrived in Kelso that evening I saw Stewart at the Kelso State Bank and made known to him the object of my business. Stewart and the others

present, together with myself, went over the affairs of the bank and determined that it was in serious enough condition for me to close the bank unless some immediate aid could be obtained. I arrived in Kelso that evening between seven and nine o'clock. I went to Portland the next morning with Stewart, leaving Kelso about five o'clock. I rather think I suggested making the [152] trip to Portland, my reason being that after analyzing the situation carefully I determined there was only one source from which aid could be obtained, and that was through a gentleman named E. S. Collins who was president of the First National Bank of Kelso and also a stockholder in the Kelso State Bank. Because of his large means and his investments in the vicinity I thought he was the logical man to aid, if aid was to be obtained. Therefore we went to Portland. I saw Mr. Collins after my arrival in Portland somewhere between eight and eightthirty in the morning. We received no aid from him. About ten o'clock I took the train at Portland for Kelso. So far as I now recall I left Stewart at the Oregon Hotel in Portland, and from that hotel I went direct to the depot. I noticed that during the time we were going down to Portland and at the time I was in Portland with him that Stewart was very pale and under a great strain. He didn't talk very much. I remember that he asked me several times my opinion as to whether or not Collins would help us. I didn't pay very much attention to just what he did say because it was just what one

might expect from a man laboring under great excitement, and Stewart appeared to be laboring under great excitement.

I reached Kelso on March 17th, upon my return from Portland, about noon. While in Mr. Collins' office in Portland I had arranged to have the cashier of the Kelso State Bank get in touch with the officers of the bank at Castle Rock, the next town to Kelso, and they were to be at the Kelso Bank when I arrived in Kelso. I closed the bank in Kelso. I found in the bank three or four pistols and a sawedoff shotgun. I unloaded them. [153]

Q. Why?

Mr. KEENAN.—If the Court please, we object to that as being wholly immaterial.

Mr. LANGHORNE.—What was in his mind. was due to his association with Stewart for a night and part of a day.

The COURT.—Oh, he may answer. I don't see the materiality of it. He can answer it more quickly than discuss it probably.

A. I unloaded all the weapons I could find.

Q. Why?

Mr. KEENAN.—I object to that. The witness' opinion would not enlighten the Court any in this case.

The COURT.—Objection overruled.

Mr. LANGHORNE.—Answer the question.

A. I wanted to remove any opportunity that Mr. Stewart might have to do anything rash. I was a little concerned as to what he might do.

About three that afternoon Stewart called me up on the telephone and we talked briefly. I then informed him of the action I had taken, and he replied that it was too bad because he had raised the money. I then said "you come up with it as soon as you can and we will see what we can do," and he said that he would be up on the train at four o'clock or else he would take another train and I think he said come up on the other side of the river.

I worked at the bank until somewhere around nine o'clock and then went to my hotel. While there George Plamondon called me up and asked me if I would come down to his house. I said I would come down if he wanted me to. I had been up practically all night and didn't care about going, but I [154] agreed to go. I saw Mr. Plamondon.

Q. What did you hear; what did he tell you?

Mr. RUPP.—Objected to on the ground that it is

immaterial.

The COURT.—Objection overruled.

Q. What did he tell you?

Mr. RUPP.—An exception.

The COURT.—Allowed.

A. When I stepped on the porch at Mr. Plamondon's house the door was open and as I stepped in he said, "Well, Fred has done it." I said, "Did he shoot himself?" and he said, "No, he went in the river."

Cross-examination.

(By Mr. RUPP.)

The conversation which I had with Stewart on the

night of March 16, 1921, continued from the time that I arrived at the bank until one or two in the morning. The conversation may not have lasted that long but the conference during which the conversation occurred did last that long. At the beginning of the conference Stewart, myself and George Plamondon were there; Louis Plamondon came in I think later. Mr. Collins of Portland was, outside of Stewart, one of the largest stockholders in the Kelso State Bank. I had made three examinations, I think, in years gone by of the Kelso State Bank, but the one or ones immediately preceding March, 1921, were made by the examiners under me. I originally went with the Banking Department in 1908, but did not serve continuously. I left the department a number of times to liquidate banks and to work in banks. The first time I examined the Kelso bank was, I would say, somewhere around 1915; it might have been the year before or the year later. [155] I think that all the examinations that I made were made one each year, each succeeding year. There might have been a year in between when some other examiner made it, but as I recall it, my examinations were year after year. One examination was made by an examiner under me after I became Commissioner. That examination was made by Bennett and Knapp. The report they sent in concerning the Kelso State Bank was a very unfavorable report and at the times that I myself had examined it, it was not in good financial condition. I never had known a time when I had

felt satisfied with the examination. The Bennett and Knapp examination was made in November, 1920. I had a conversation with Stewart November, 1920, and before March 16, 1921. conversation took place at my office in Olympia on Sunday night March 6, 1921, when I demanded his resignation. I asked Stewart to come to Olympia. I told him my reason for demanding his resignation was that I was not satisfied with his management of the institution. I cannot recall whether he wrote out his resignation then or not, but I don't think he did. It was my intention to have him understand that he would have to sever his connection with the bank, but I did not care to give any publicity to it at the time for fear of the ill effect it might have on the institution. The understanding was that the management of the bank should be virtually turned over to someone else and that he would resign as soon as he could gracefully do so. My trip to Kelso on March 16th was not due to the fact that he had not resigned. I cannot recall that I anticipated the receipt of his resignation before the 16th of March and I do not think that I heard anything from Stewart between March 6th and March 16th concerning my request for his resignation and a change in the [156] management of the bank. I do not recall having any conversations with Stewart except those which took place when the various examinations were made but at each examination all objectionable items were criticised and he was given a copy of the criticisms. When an

examination is made there are two sheets of criticisms which are a part of the report, which are made in duplicate. The duplicates are left with the bank at the time and supplemental instructions are sent out from the commissioner if he deems advisable by letter from headquarters. I did, however, at the times I examined the bank, talk to Stewart and told him each time that the condition of his bank was unsatisfactory.

Redirect Examination.

(By Mr. LANGHORNE.)

The report to Louis Plamondon was made after the conversation I had with Stewart on March 6th.

Q. And isn't it a fact that it was between March 6th and the date of this report, which was March 14th, that you had requested Mr. Plamondon to make an examination of the bank? (Handing witness paper.)

A. I hadn't requested that this report be made.

Recross-examination.

(By Mr. RUPP.)

I do not recall that Stewart raised any objection to going to Portland on March 17th. I am quite sure that I am the one who suggested the trip. At the conference on the night of March 16th Mr. Carothers, one of the directors of the [157] bank, may have been present. I do not now recall whether he was there or not. No one of the other directors was present.

Testimony of H. E. McKenny, for Plaintiff.

H. E. McKENNY testified on behalf of the plaintiff as follows:

(By Mr. LANGHORNE.)

I live at Kelso, Washington, and have lived there for twenty-two years. I have held the following official positions in Cowlitz County: Prosecuting Attorney, State Senator and Judge of the Superior Court. I am now practicing law at Kelso. I am the administrator of the estate of Frederick L. Stewart, deceased, appointed as such by the Superior Court of Cowlitz County. I was so appointed in the latter part of March, the exact date I do not remember. I had been acquainted with Fred L. Stewart since June, 1889. I was not interested with him in the bank at the time of its failure, but was interested with him in a good many other matters. I had been at one time a stockholder in the bank.

The amount of claims filed against the estate of Fred L. Stewart is \$72,721.17. All these claims have been allowed by me as administrator, but not all of them as yet by the Superior Court because I have not taken some of them up with the Court yet. The inventory of the estate shows in the neighborhood of \$160,000, practically all of it encumbered by mortgages. Suits have been instituted to foreclose some of these mortgages. The paper just shown me purports to be [158] a suit by the American Savings Bank & Trust Company against myself as administrator of the estate of Frederick L. Stewart, deceased, and has not as yet been

served upon me. By looking at such paper and ascertaining the land described therein, I can say that I think that there are suits now pending covering all the real estate belonging to Stewart except two small tracts of timber land in Okanogan County. The mortgage indebtedness against the farm which is appraised at \$100,000 is \$126,000. I have not seen the figures in the papers just shown me, but knowing that the claim amounts to something over \$40,000 I presume that is the amount set forth therein. The mortgage indebtedness is considerably more than the value of the estate as shown by the inventory. The estate could not redeem. The total amount I have taken in is \$1,475.72. I have expended to date \$431.55. I have a trifle over \$1,000 on hand all told. The inventory value I gave includes everything, personal as well as real property.

I received a communication from Fred L. Stewart on the morning of March 18th. I do not have it with me. I have the envelope it came in and the enclosure, but I mislaid the letter in some way. I could not find it.

(Whereupon there was offered and admitted in evidence without objection the enclosure and envelope just mentioned and same were marked Plaintiff's Exhibit 1.)

The enclosure just mentioned is a deed to a quarter interest in the farm which I have just mentioned as having been appraised at \$100,000. I have been previously interested in this farm and

Stewart bought me out. He had not paid me for it and I presume, according to his letter, he [159] wanted to make me as near whole as possible. I could not find the letter yesterday, although I tried to. I made a search for it. As I remember the contents of the letter, and I read it over quite carefully, he said that he would have to make a trip to California for the purpose of raising funds because he was very close run and could not make it without getting money somewhere; that I would find this deed enclosed and he hoped I would be able to get even. I know that Stewart sent a deed to Al Maurer of Kelso from Portland, which was received on the morning's mail on March 18th. Maurer had the same interest in the property which did. I have the envelope, letter and deed sent to Mr. Maurer by Stewart with me.

(Thereupon said envelope, letter and deed were

offered in evidence and received without objection

and marked Plaintiff's Exhibit 2.)

I know also that James Crouch on the morning of March 18th received from Stewart a deed to a quarter interest in the same property.

No claims have been filed with me as administrator of the estate growing out of the transactions with Fred Stewart on the 17th of March, 1921, or for some days prior thereto.

Cross-examination.

(By Mr. RUPP.)

I was a stockholder in the Kelso State Bank in 1899. I ceased to be a stockholder in January, 1906,

at which time I went to southern Oregon. Stewart made the arrangements [160] for the purchase of my stock, but the same was sold to the Weyer-haeuser Timber Company. The stock, however, was not transferred to the company but to some officer thereof. I cannot remember just when I was appointed administrator, but it was just a few days after Stewart disappeared. As administrator there came into my possession two life insurance policies payable to the estate of Frederick L. Stewart, one being that of the Bankers' Life of Des Moines, for \$6,000 and one that of the Northern Life for \$5,000.

Redirect Examination.

(By Mr. LANGHORNE.)

I did not bring an accident policy that was issued on the 17th day of March, 1921. I mailed that to you several days ago in a letter. There came into my possession, however, an accident policy for \$2500 executed by the Travelers' Life payable to the estate I presume. This policy was issued on March 17th. I mailed that policy to you four or five days ago.

Recross-examination.

(By Mr. RUPP.)

This accident policy is one of these small insurance policies which resemble in form a ticket such as people buy at the train.

The COURT.—Do you remember whether that was something got in Portland or in Kelso?

The WITNESS.—That was got in Portland. Mr. Sardam brought it to me. I cannot tell how he got it but it was in Stewart's grip left on the boat as I remember. [161]

Testimony of A. C. Stevens, for Plaintiff.

A. C. STEVENS, being first duly sworn, testified on behalf of the plaintiff as follows:
(By Mr. LANGHORNE.)

I live in Portland, Oregon, and have lived there since 1914. I am now and since 1914 have been engaged in the automobile business in Portland. handling Haynes and Winton cars. I had been acquainted with Fred Stewart for about one year prior to his disappearance. I saw him during that period six or eight times approximately. I had conversations with him when I saw him and became fairly well acquainted with him. I saw Stewart at my office in Portland between 1:30 and 2 o'clock on the afternoon of March 17th. My office is at Sixteenth and Washington Streets. At that time Stewart was very different in his conversation. He seemed to be pale and he would talk in a loud voice for a few minutes then he would dwindle down you couldn't hardly hear him; he was changeable; he didn't follow out any conversation continuously.

The COURT.—Is that what you mean by indifferent?

The WITNESS.—Yes.

Q. Did he seem to be under any excitement or strain?

(Testimony of A. C. Stevens.)

A. He said his car was coming down that afternoon and he wanted me to sell it for him. He was going down to southern California and he would take a new car later on in California. I told him that it was impossible for us to sell the car and get any kind of a price out of it at that time owing to the used car market, and that it would be better for him to keep his car and take it down there and use it. He then decided that I should take the car and store it until he wanted it and I could ship it down to San Pedro and he could get it there. [162] Somewhere between four and four thirty that afternoon the car arrived and my service man stored it for the time being at the Speedwell Garage, 14th and Couch Street, two blocks away from my business. We got a storage check from the garage showing the storage of the car, same being delivered to my service man who took the car there. This check was put in our office and was there on the night of March 17th and so remained until Mrs. Stewart wrote down for the car some weeks afterwards. The check is in our files. I have shown it to several insurance men, who came in there making inquiry on it. I tried to find it the other day and couldn't locate it. I am in a position to state that the car was in the garage on the night of March 17th and that it there remained until March 23d. I paid charges on it for that period of time and have the bill with me.

(Whereupon such bill was offered in evidence, without objection, and same was received and marked Plaintiff's Exhibit 3.)

(Testimony of A. C. Stevens.)

Cross-examination.

(By Mr. KEENAN.)

The man sent by Mrs. Stewart to Portland to get the car was named Hayes, I believe. I have a letter here that Mrs. Stewart sent down with Hayes. He is the same man who brought the car in on March 17th.

(Whereupon said letter was offered in evidence and received without objection and marked Defendants' Exhibit "A.") [163]

When Stewart was in my office on the afternoon of March 17th, he did not say anything about the ownership of the car. I, however, sold this car and the understanding I had all the time was that this car was bought for Mrs. Stewart and that she was to be taught how to drive it and that it was her car. I am the one who suggested that it would be better to ship the car to California than for me to sell it and he in turn buy a new one. He finally acceded to my suggestion and stated that he would advise me of the place to which it would be shipped. San Pedro, however, is usually the shipping point. He asked me where I could ship it to and I told him San Pedro and our agency in San Francisco would take the car and hold it there for him. On March 17th when he was in my office he mentioned a few little things to do. He said he had a rattle in the spring bolt and he thought it was missing. My service man turned it up. He only spent a few minutes on it for which there was no charge made. He gave no further instructions as to the

(Testimony of A. C. Stevens.)

disposition of the car, except to keep it until he had advised me and did not try to have me arrange for a sale of the car that particular day.

Testimony of George F. Plamondon, for Plaintiff.

GEORGE F. PLAMONDON, being first duly sworn, testified on behalf of the plaintiff as follows: (By Mr. LANGHORNE.)

My home is really at Kelso, but I am working at Woodland for the time being. I am a brother of Louis Plamondon. In March of last year I was living in Kelso and was assistant cashier of the Kelso State Bank. I was with the bank for about [164] twelve and one-half years. I was assistant cashier for around six years. I was acquainted with Stewart; was in the bank throughout business hours on March 16, 1921; the bank closed at three o'clock. I closed it, just the same as any other day. We balanced up our cash, balanced up our books and when the business was done we put the money in the safe, set the time locks, put our books away and locked the vault. The cash was all put in the vault that night and the time locks set for eight the following morning. It could not be opened before that time unless acetylene torches and things of that sort were used.

I saw Mr. Hay on the night of the 16th and was at the conference between Mr. Hay and Mr. Stewart. That conference lasted, as I recall, from ten or ten thirty until after one o'clock. At the time the conference broke up Stewart was pretty badly

with him

(Testimony of George F. Plamondon.) shaken. I have no other way of describing his condition except to say he was worried. That had been his condition for several days past, very much worried and having difficulty in standing up under it. On the night of March 17th about nine o'clock I was on my way to Kalama, due to a telephone call I had received from Mr. Stuart, the prosecuting attorney. I saw Mr. Hay that evening be-

Mr. KEENAN.—If the Court please, we object to that as being wholly immaterial,—the conversation which took place between Mr. Plamondon and Mr. Hays.

fore I went to Kalama and had a conversation

Mr. LANGHORNE.—Yes, and I contend, if your Honor please, that just as quick as he heard of it, whatever was said and done at that particular time is just as much a part of the *res gestae* as if this conversation took place right there at the boat. [165]

The COURT.—I am admitting this kind of testimony. It may not be the best testimony, but it does throw some light on the degree of care and scrutiny with which each particular witness might have been observing Mr. Stewart's appearance, conduct and demeanor. Objection overruled.

Mr. KEENAN.—An exception.

I do not know that I can recall the exact words I used but the effect was that "Fred had done it." By saying that Fred had done it I meant that he had made way with himself.

(Testimony of George F. Plamondon.)

I had knowledge of Mr. Hays coming to Kelso on the night of March 16th. I was so informed by Mr. Carothers, the President of the Kelso State Bank. I did not tell Stewart that Mr. Hays was coming, Mr. Carothers having asked me not to mention it.

Cross-examination.

(By Mr. KEENAN.)

I heard Mr. Hays'testimony in court this forenoon. I had knowledge in a general way of the request made by the banking department on Stewart to resign. I had talked that matter over with Stewart himself the next morning after he came back from Olympia.

Q. Well, did he look any more shook up at that time than on the 17th of March?

A. I don't know how I can answer that. He looked pretty bad I thought that morning when he returned from Olympia. I would say that he appeared more nervous on the 17th of March than on the 7th. I had not very often seen him look nervous and disturbed before March 7th. My recollection is that he [166] was nervous after the examination made in November, 1920, by the State Banking Department. It is somewhat difficult for me to say how nervous he then was, but he was worried and I remember the remark he made to me what a relief it was that the examination was over. The regular bank examinations were once a year. I do not recall any special examinations other than the regular bank examinations. I can-

(Testimony of George F. Plamondon.) not say whether the admonitions of the banking department were the same, that he would have to straighten the bank up or they would close it, because I never saw the correspondence that had passed between Stewart and the banking department. I knew before March 6th that the bank was embarrassed in that we had to borrow money. As to its being in a bad condition I was not fully aware of it. I had a general knowledge of Stewart's relations with the bank. I would not say that his account with the bank was usually overdrawn, but he would have overdrafts quite frequently. I cannot recall off-hand how many accommodation notes he had in the bank. I do not know of any accommodation notes that Carl Hayes put in there. I do recall a transaction where a dance-hall was sold a few months before Stewart went away and it had appeared upon the records that Hayes had bought the place. I do not recall that Stewart procured Hayes to give a fourteen hundred dollar note when he paid nothing whatever for the dance-hall. I was in on the deal for the purchase of the dancehall. It is not exactly correct to say that the dance-hall was bought by Stewart and myself and that we used Carl Hayes' name to give the note. I believe Stewart gave Hayes the amount that each of us got, three hundred dollars and something, I can't recall the exact amount. Mr. Adams would know. I believe that Stewart bought the dance-hall from Mr. McDonald. Now, [167] whether or not Stewart or Hayes bought it I can(Testimony of George F. Plamondon.)

not say. Whether it was mortgaged for all it was worth when McDonald had it, would be a matter of opinion only. I don't know what McDonald got. We then made a pretended sale to Hayes and took a note for \$1400.00 from him. That note was never paid by Hayes. I cannot recall any other transaction when Hayes came in and gave an accommodation note. The fourteen hundred dollar note that Hayes gave was sold to the bank and Stewart, Hayes and myself each took one-third of the fourteen hundred dollars.

Redirect Examination.

(Mr. LANGHORNE.)

Q. Anything wrong about it that you know of that the property was mortgaged for all it was worth?

A. No, sir. Upon the request of Mr. Adams I very gladly repaid what Stewart gave me at that time.

After the bank closed I did not go in Mr. Stewart's safety deposit box, but Mr. Sardam, Mr. McKenny and I were there when the box was opened. It is my recollection that the paper just handed me was one of the papers found in the box, likewise the envelope.

(Whereupon said papers were marked Plaintiff's Exhibit for identification.)

Recross-examination.

(By Mr. KEENAN.)

Mr. Sardam was not present at the conference

(Testimony of George F. Plamondon.) on the [168] night of March 16th. I do not know whether he was in the bank on the night of the 15th, as I was not there. Mr. Sardam was probably in the bank on the 15th and 16th because, as I remember, Sardam and Mrs. Sardam were visiting there for several days and Mr. Sardam was in and out. I cannot say how much of the time or how often he was in the bank on the 17th.

(Testimony of the witness closed.)

It was then admitted by Mr. Keenan, counsel for the Prudential Insurance Company, that the last annual premium due prior to Mr. Stewart's disappearance had been paid. Whereupon there was offered and admitted in evidence, without objection, three insurance policies executed by the Prudential Insurance Company and two insurance policies executed by the Mutual Life Insurance Company of New York, same being marked Plaintiff's Exhibits 4, 5, 6, and 8.

Testimony of Robert W. Roberts, for Plaintiff.

ROBERT W. ROBERTS, being first duly sworn, testified on behalf of the plaintiff as follows: (By Mr. LANGHORNE.)

I live at Portland, Oregon, and have lived there about twenty-two years. In March of last year I was and had been at all times since November, 1905, a red cap porter at the Union Station. I knew Fred L. Stewart of Kelso and had known him about three or four years. I have waited on him; I knew him well enough to simply greet him like

(Testimony of Robert W. Roberts.)

"How do you do, [169] Mr. Stewart," and whenever I handed him his baggage I met him. Of course he didn't know my name that I know of. I only knew him by seeing him and handling him so much. He made frequent trips to Portland. I remember seeing him in March of last year, but don't remember the date. I saw him, however, on the day of his disappearance about four o'clock in the afternoon. A Union Pacific train leaves the Union Station at four o'clock for Seattle. In my capacity as porter at the depot we met taxicabs and busses to assist the passengers to and fro and I met this cab at the curb. I got Mr. Stewart's baggage which, if I remember correctly, was a handbag and a brief case. So I says, "How do you do Mr. Stewart," and took his baggage immediately inside of the door and waited on his motions. He paid the taxi man and dismissed him. He didn't come in the house, in the building, at all. He waited outside and I was looking out of the door at him just to see what his actions were and waiting on him, and I thought he stopped to recognize some friends. But he just walked around a few steps and looked like he was in a great quandary, undecided which way to go or what to do. Then he came up the steps and beckoned to me to come out with his baggage. I came out with his baggage and he said, "Put it in this car here, the first one." I said, "Have you changed your mind Mr. Stewart?" and he said "Yes, I have." And with that he drove away. I never saw him again.

(Testimony of Robert W. Roberts.)

He looked like he was in a deep study or had not reached a decision whether to go or not to go or go in what direction. He looked like a man—walking around outside. That was unusual for him at the times I have noticed him because he was always a thoroughgoing man, looked like he always decided which way to go, and never back and forth in that manner. [170]

Cross-examination.

(By Mr. KEENAN.)

The first time I thought about this occurrence of Mr. Stewart's was the next day when it appeared in the morning paper and I talked with my coworkers down there right along because there was several of us who knew him quite well and we were saying how bad it was that that happened, knowing him so well.

I recognized him as soon as he got out of the cab. What caused me to recognize him was because he was a very pleasant man and having traveled so often his face was very familiar. I was particularly familiar with the manner in which he walked. I never noticed anything peculiar about his walk. He was a slender man, not a fat man.

I did not say that I thought he was talking with somebody for a moment when he got out of the cab. I said I went inside and had his baggage waiting for him and he stopped there as if he was waiting for a friend who might approach him, evidently looking for someone. I thought that at first. I

(Testimony of Claude Hanson.)

didn't see him say a word except to pay his taxi man when he got out of the cab in the first place.

Testimony of Clyde Hanson, for Plaintiff.

CLYDE HANSON, being first duly sworn, testified on behalf of the plaintiff as follows:

(By Mr. LANGHORNE.)

I am living now at Central Point, Oregon, but am working at Napa for the logging road. Napa is thirteen miles from [171] Astoria toward Portland. On March 17th last I was living at Deer Island which is six miles down the Columbia River from St. Helens. I was working at St. Helens having an interest in a garage there at that time. I was in the garage on the evening of March 17th last, but not in St. Helens, the garage being about one mile and a half from St. Helens. The train does not run through the city of St. Helens, but one mile and a half away therefrom. The train which leaves Portland about six in the evening, reaches St. Helens about 7:40. At that time I was at the depot with a taxicar.

I knew Fred Stewart of Kelso. He got off the train that evening. He came to the car just as the train was pulling out and asked me if I could meet the boat before the train pulled out, beat the train to Goble, and I said I didn't think I could as it was a fast train and I had to go to the garage a couple of blocks from the depot before I could go and that would make me three or four minutes behind the train. I drove, however, at a rapid pace and missed the boat about a minute I should judge.

(Testimony of Clyde Hanson.)

It was just out in the river a couple of hundred feet. When we got there he got out and paid me for the trip and asked me if I knew who he was and I said "No, I don't," and he said, "I am Fred Stewart." I shook hands with him; I had known him for a good many years. We spoke a few words. I asked him how business was and he said, "Well, fairly good," and he asked me if there was another boat and I said, "I don't know but I will go and find out." I went to the depot and asked, and there was another one in about thirty minutes. He said, "All right. I will go then and call up my wife and have her meet me in Kalama." That is all that was said between Stewart and myself.

The reason I did not know him was because it was dark, [172] he had his overcoat on turned up around his neck. There was nothing unusual in his manner which struck me at that time, although the next morning after I heard he was drowned I saw then where he did act very different than he usually did. I started on my return trip from Goble in about five minutes after I reached there. I stopped at Goble about two hundred feet from where the ferry boat lands. At Goble there is a depot, confectionery store, dry goods store and grocery store.

Cross-examination.

(By Mr. KEENAN.)

Stewart had on a regular overcoat, I think. It was dark and I don't remember. I don't remember the color. I think he had a hat on. I was on the

(Testimony of Clyde Hanson.)

platform when the train came in, but don't recall seeing him get off. Stewart came to the car. A man named Johnson sent him to my car. I don't recollect whether Stewart told me that he just got off, but I knew that he just got off the train. I think it took me from eighteen to twenty minutes to drive to Goble. Stewart sat in the back seat. Not a word was spoken after we left, and when we got to Goble I got out first and opened the door. Then he got out and unbuttoned his coat and got his money to pay me. Then he said "Don't you know me?" I replied that I didn't. I recognized him when he told me who he was. I think that was just before he paid me. I had known him for twenty years I think. I think he had his overcoat turned up and buttoned. I do not know whether he had his hat pulled down pretty well to his ears. The reason I did not get a very good look at his face was that it was after dark, about 7:40 in the evening, and he seemed to be in [173] a hurry. I didn't take any time. I stopped my car about one hundred feet from the depot at Goble. My car was between the depot and the ferry slip and I was about 100 feet maybe in that far from the slip. I was in plain view of the slip. I did not notice one of the ferries which carry automobiles with a little pilot house in the center standing there. I do not know that I formed any opinion as to why Stewart asked me "Don't vou know me?" He had known me for a great many years. Whenever he met me he always said, "Hello, Clyde," or "How are you, Clyde," call(Testimony of Clyde Hanson.)

ing me by my first name. I do not recall exactly what was said, but he asked me if I didn't know him. If I had seen Stewart walk around that evening I would have recognized him. He walked with his head thrown back and his shoulders straight. His pace was quite quick. The train was on time that night, I think, when it got to St. Helens. The due time of the train may have been 7:18 instead of 7:40, I do not know the exact time.

Redirect Examination.

(Mr. LANGHORNE.)

It was very rainy and stormy that night.

I was one of the depositors in the Kelso State Bank when it failed.

Testimony of T. H. Adams, for Plaintiff.

T. H. ADAMS, being first duly sworn, testified on behalf of the plaintiff as follows:

(By Mr. LANGHORNE.)

I live in Vancouver, Washington, and have lived there [174] sixteen years. I am now the Special Deputy Supervisor of Banking, winding up the affairs of the Kelso State Bank. I did not publish a notice to creditors, that notice having been published before I took charge. I am acquainted with the claims that have been filed against the bank, and no claims have been filed against the bank growing out of any transaction with Fred Stewart on the 17th of March or for some ten days prior thereto.

(Testimony of T. H. Adams.)

Cross-examination.

(By Mr. RUPP.)

I have made a pretty thorough examination of the condition of the Kelso State Bank back to 1910. The record is not perfect back of that date, but from that date on I am thoroughly familiar with it. My judgment is that the bank never could have liquidated and paid in full its depositors since 1910.

With reference to a transaction concerning some notes of \$800, I can say that there had been a disaster to one of the industries of Kelso. Thompson Ford Lumber Company's mill had burned and as I have understood, Stewart had busied himself in a patriotic way trying to get the mill rebuilt with the result that twenty-five prominent citizens of Kelso had agreed to contribute \$800 each to the rebuilding of the mill and take a first mortgage covering all of the notes of \$800 each. Stewart was one of them and George Plamondon another. The notes were executed by the Thompson Ford Lumber Company in favor of each of these gentlemen, one to Stewart and one to Plamondon. The name "George F. Plamondon" was erased and the name "Kelso State Bank" was inserted, and the name "F. L. Stewart" [175] erased and the name "Kelso State Bank" inserted as payee. One or the other of the amounts-not having thought of it for some little time-but one or the other of the \$800 amounts was credited direct to the Thompson Ford Lumber Company and the other to the other payee and a check (Testimony of T. H. Adams.)

was given to the Thompson Ford Lumber Company for the amount. These notes have not been liquidated so far as I know, but at my request George Plamondon took them up and reimbursed the bank for them.

With reference to the Philip Richter Estate, I cannot tell very much of Stewart's handling of this estate except two or three transactions which affected the Kelso State Bank.

It was thereupon stipulation by and between counsel for the respective parties that prior to March 16th, 1921, F. L. Stewart had used moneys of the Richter Estate to the amount of several thousand dollars which moneys he was not entitled to use and which, if informed against, rendered him subject to the penal laws of the state and if convicted to confinement in the State Penitentiary to whatsoever punishment the statute provides.

Q. Mr. Adams, what can you say from an examination of the books of the bank as to whether or not the bank was hopelessly insolvent for a period we will say of six months before March 16, 1921?

A. There was no particular change in the bank during that period of time. It was in substantially the same condition six months before the closing that it was on the day of the closing. It was in this much worse condition that notes would be renewed with the interest added and [176] perhaps some other poor notes taken in, but substantially the same condition prevailed.

(Testimony of T. H. Adams.)

That condition would have been apparent to me and I may say to any man who made a careful analysis of the paper without too much optimism or hopes for the best happening.

Testimony of Carl H. Hayes, for Plaintiff.

CARL H. HAYES, being first duly sworn, testified on behalf of the plaintiff as follows:
(By Mr. LANGHORNE.)

I live at Kelso and have lived there about thirteen vears. I was acquainted with Fred Stewart and we were somewhat friendly. I had known Stewart ever since I have lived in Kelso.

I went to Portland on March 17, 1921, starting from the Peters Garage in Kelso. I drove Mrs. Stewart's car to the Haynes garage somewhere on 16th and Washington Street in Portland. I arrived in Portland somewhere between three and four o'clock. I left Portland that afternoon on what is known as the North Bank Road on the Oregon side of the river going to Rainier. There is a ferry runs from Rainier to Kelso, crossing the Columbia River and then steaming up to Kelso. After I got on the train I saw several Kelso people on the train, among them Stewart. He was in the chair car. I talked with him a little while, and he asked me if I had heard what had occurred in Kelso, meaning the failure of the bank. I told him I had, and he asked me several questions about it but his voice would seem to change in a way that I couldn't understand very well. The train

was making a noise [177] and I couldn't understand very much that he said. Anyway he talked about the bank and I asked him if he was going to be able to get it straightened out and he said that he thought he would. He said that he had made arrangements about getting some financial aid in Portland, but he didn't know whether he would be able to get enough or not.

Q. Did he ask you to leave him or did he say anything that caused you to leave him?

A. Yes, he said that he was tired and worn out and he was going to try to get a little sleep if he could, and I thought probably that was the best thing for him and told him I would go back in the smoking car and wake him up.

I understood he was going to Rainier, but he later didn't go that far. I went back to call him when we got at Rainier, but he was not on the train so I supposed that he had got off at Goble where he often got off, and crossed the river at Kalama. His condition that evening was such that I couldn't understand him. His voice was changed and he was completely worn out, just like a man that had just got out of the hospital. There was no color in his face and no pep at all. He seemed to be worried and nervous, just a physical wreck; not the same man at all that I had known before.

I did not see him in Portland prior to getting on the train. I got off at Rainier and crossed over on the launch "Eadem." George Polen, check

of the School Board at Kelso and George Umbaugh, editor of "The Kelsonian," were on board and Charley Abbott, a druggist at Kelso, also, crossed over on the "Eadem" to Kelso. I told these gentlemen that Stewart was on the train, and that I had been back there and talked with Stewart. No one of them said anything to me about seeing him get on the train at the North Bank station [178] at Portland.

Cross-examination.

(By Mr. KEENAN.)

I do not remember the exact time I left Kelso that morning. It was somewhere about one o'clock. The bank was closed at that time; it had been closed about noon-about an hour before I left. I had dinner about twenty-five or thirty minutes before I left. Nobody rode with me in the machine to Portland. I reached Portland somewhere between three and four o'clock. After I left the car at Mr. Stevens' place I went down town and did not have any particular place to go. I didn't wait; thought I would see Stewart in Portland, and ride down with him on the train. I wanted to tell him that I had delivered his car-or his wife's car—to the garage. I didn't meet him in Portland, so I went down and took the six o'clock train from the North Bank station. I had no business in Portland that day. I called up the Oregon Hotel where Stewart stayed when he was in Portland, and they said that he had checked out. That was just after I got in town. I had no idea as to

any other place to look for him except the hotel. I went down to the depot to take the train quite a little time before train time. I remember I got a shave and a shoe shine. I was killing time waiting for the train. I had an idea that Stewart would come and take the same train.

I don't remember being interviewed on April 27th by an insurance inspector by the name of Johns. I remember there were several insurance men down there who asked me questions, but I can't remember that man by name anyway. I don't remember saying to that man that I went down to take the six [179] o'clock train Stewart was not there, "But I knew he was coming so I got on the train." I don't remember that, but I did think he was coming and that he would be on that train. Stewart never at any time said anything to me about taking the automobile to Portland. I had no orders from him to take the car to Portland. Mr. Sardam told me that either Mr. Stewart or Mrs. Stewart wanted the car taken to Portland and delivered to the garage. Mr. Sardam told me that, I think, some time in the morning; the exact time I can't remember, probably between eight or nine o'clock. I met Mr. Sardam I think on one of the main streets of Kelso. I did not see Mrs. Stewart before I left, nor do I remember calling her up. Mr. Sardam told me to leave the car at the Haynes garage. Mr. Sardam had before that time given me instructions about the car; I don't remember them exactly, but I often took him out in the car where

he wanted to go and make calls, and if he came and asked me to take him I suppose it was arranged satisfactorily with the owner of the car, and I have taken him on a few drives that way. I was not employed by Mr. Stewart as a chauffeur, but when Stewart wanted to send any one out in the country, agents or collectors, he called on me to drive the car for him. I cannot say that I can now recall a single instance where before March 17th Mr. Sardam ever gave me instructions to take the Stewart car to any garage or to any particular place. I would often use the car. Of course I understood that Mrs. Stewart knew that I would take care of it and take to Portland. I wouldn't have questioned Sardam's right to tell me to take it there. I didn't question his right but did just what he told me to.

Before coming to Kelso thirteen years ago I was in the logging business and I was in that business some time after I [180] came to Kelso. I quit the business about three years ago. I am now in the sand and gravel business there and automobile business. I handle used cars. Mr. Stewart and myself were not interested in very many different ventures. I did quite a lot of business with the bank and borrowed some money from the bank that I used in buying and selling automobiles, but Stewart was not interested in any of that kind of work. We did have some business together, but very little. I do not remember of ever having anything to do with the selling of the

tract of timber land at Chehalis or Centralia about two years ago. I do not remember ever having been interested in any timber land, with any parties in Centralia.

The conversation which I have testified to as having taken place between Stewart and myself on the train on the evening of March 17th is all the conversation which took place between us that evening. I remember of going to Kalama the next morning after the disappearance of Stewart. I did not send any telegrams there to anyone. I sent no telegrams for Mrs. Stewart. Perhaps you mean the telegram that I telephoned to Kalama to see if there could be a reward for Stewart's body. The fishermen wanted to know what there was in it for them if they would go out and search, and I wired to some of Stewart's friends at Kelso and asked what could be arranged about offering a reward. I cannot remember whether I telegraphed Mr. Sardam about the reward or not. I didn't go to Kalama the next morning after Stewart's disappearance and send a telegram from there to California for Mrs. Stewart.

Somewhere along about a week after Stewart's disappearance I went to Portland and got the automobile, drove it back to Kelso and put it in Robb's garage. It remained there two [181] or three days and then I took it to Tacoma. I did not sell it in Tacoma; I left it here in Mr. Sardam's care. I don't know whether Mr. Sardam afterwards bought the car or not; I don't know what did be-

come of it. I heard it was sold. I do remember delivering the car at a garage, but I am not acquainted in Tacoma and can't recall the name of the garage. I think Mr. Sardam went with me to the garage, going there with me from some place down town in Tacoma.

I am not engaged in any very big business in Kelso. I am in the sand and gravel business. I have a motor truck which I operate there and haul sand and gravel. I don't think I owned an automobile when Stewart went away. I have none now. I have not had two touring cars up to the last month. I was not arrested for speeding two or three weeks ago. I was fined for speeding. The car in which I was riding at that time belonged to a man in Tacoma. I sold cars for two or three years in Kelso at different times for myself, bought them and traded them and sold some for other people on commission.

I went to Kalama to assist in recovering the body of Stewart. I went down several times and talked to the fishermen who were dragging the river. I don't know how many times I went down. I went out with Captain Reid on March 18th and searched the river bank up and down both sides of the river down as far as Cottonwood Island and around the island. I remember walking around the island with Captain Reid, he going one way and I the other. I don't remember any particular conversation with Captain Reid after we finished the circuit of the island. I did not tell Captain Reid

that Stewart didn't go into the river; that there was no use looking any more. I was down several times and asked him [182] if I could furnish him anything or help him in any way about the dragging and I gave him equipment I had gotten from Brady the grappler of Portland. Brady is an expert who drags rivers in locating bodies.

The time it takes a boat to go from Rainier to Kelso depends on the current in the Cowlitz River. It might have been an hour the night I came over. I don't know that one could make any better time by taking the boat from Rainier to Kelso than he would if he took the ferry from Goble to Kalama, but if the last mentioned route was taken one would have to hire a car at Kalama and drive from there to Kelso, and I thought inasmuch as I was in no particular hurry anyway I would go to Rainier and from there to Kelso. If one misses the four o'clock train which leaves Portland for Seattle, their next chance to reach Kelso is to go down the Oregon side of the river to Rainier and from Rainier to Kelso. A good many people who remain in Portland until five or six o'clock use that route in getting home.

I would say I was a very close and intimate friend of Stewart's before he went away. I wouldn't say that I as well as anybody in town would know when he would go and come. I didn't run Stewart's business altogether, you know. I do know that Stewart has come from Portland to Goble, crossed the river to Kalama and come

from Kalama to Kelso, but I couldn't say when such a trip was made. I have driven Mr. Stewart's car down there a few times and brought him home from Kalama where he made the trip that way. I have no reason for remembering the date. I am satisfied, however, that I have gone to Kalama for him within six months prior to March 17, 1921. He often, when he came that way, telephoned for his car to meet him. [183]

Redirect Examination.

(By Mr. LANGHORNE.)

I reached Portland somewhere between three and four o'clock in the afternoon. Shortly after that I called up from the Stevens' garage and asked the Oregon Hotel if Stewart was there, and they said he had checked out.

Testimony of Frank J. Sardam, for Plaintiff.

FRANK J. SARDAM, being first duly sworn, testified on behalf of the plaintiff as follows:
(By Mr. LANGHORNE.)

I live in Portland, Oregon, and have since about the first of August, 1921. Prior to that time I resided at Tacoma and had so resided for about two and one-half years. I am a life insurance agent. I went with the Northern Life Insurance Company in 1912. I was so engaged while living at Tacoma. I am still an agent for the Northern Life Insurance Company.

Q. Are you general agent for the State of Oregon? A. So called.

Q. For the Northern Life? A. Yes, sir.

The Northern Life carried two policies, each in the sum of five thousand dollars, on the life of Frederick L. Stewart. I wrote one of them. While Stewart lived in Kelso he was an agent for the Northern Life in Kelso. The policy which I did [184] not write was taken out about seven or eight years prior to March 17, 1921. The one I wrote was about two years old, I believe.

I was well acquainted with Fred Stewart and his family and mine were very good friends; we were next door neighbors for many years. I lived in Kelso off and on for about six or seven years. My occupation there was practically the same as it is now. I had some other interests there when I first came, but most of my time was given to insurance work.

I was in Kelso on the night of March 17, 1921, and had been there prior to that night about five days, arriving the Saturday night previous to March 17th. The reason for my going to Kelso was that Mrs. Stewart wrote and asked us to come down. We didn't know until we got there what the reason was. From the time we reached Kelso until the night of March 16th Mr. Stewart had spells of quietness which were uncommon. He seemed to be very nervous, more nervous than usual. March 16th was Wednesday. I saw Mr. Stewart on the night of March 16th after he came back from the bank. They had a session at the bank until a late hour and I saw him after that. He was very nervous and pallid. He looked to me like he was about to

collapse. That night after Stewart came back from the bank he remarked that he wanted to send the automobile to Portland and said he would have to see Carl Hayes in the morning and have him take it down, and he asked me if I would see Carl Hayes for him if he didn't see him. The car was to be taken to the Stevens' garage in Portland. I told Stewart that if I could find Haves I would tell him. I saw Haves in the morning some time about ten o'clock I would say, and told him what Mr. and Mrs. Stewart had discussed. I do not know when he took the [185] car. So far as I know, Haves, prior to my conversation with him, knew nothing about Stewart's going to Portland, nor had he any previous knowledge of my wanting him to take the car to Portland until about ten o'clock on the morning of the 17th.

The next time I heard from Stewart after he left Portland was about nine o'clock on the night of March 17th. Mrs. Sardam and I were in his home visiting there. About nine o'clock the telephone rang. I went to the telephone; it was Stewart. He said he was at Goble waiting for the boat; that he would be home in about forty or forty-five minutes, or such a matter. He inquired about the health of the family and people who were there and about the little boy Sam and his wife. He wanted to know how Sammy and his wife were. The conversation was rather general. At the time his remarks didn't strike me as being anything more than a normal telephone conversation, until toward

the end of the conversation his voice kind of pitched up high and peaked out like a man was sort of backing away from the 'phone like. The unusual thing about his tone of conversation was that his voice sounded like he was trying to control it. It was suppressed in some way. The next thing I heard about Stewart after that conversation was when William Stuart, the prosecuting attorney who lives at Kelso, telephoned the Stewart residence. · I answered the telephone and he asked me to come over to his house which was just a few doors away. No one telephoned me from Kalama. I went to Kalama that night about an hour or an hour and a half after the conversation with William Stuart, the prosecuting attorney. Possibly an hour elapsed between the time I had the conversation with Fred Stewart and the conversation which I had with William Stuart, the prosecuting attorney. William Stuart and Fred Stewart are [186] not relatives They spell their names differently.

Cross-examination.

(By Mr. RUPP.)

I first went to live in Kelso in 1911 or 1912. I was then writing life insurance for the Northern Life Insurance Company. My father and other men interested in logging operations were logging at that time in Lewis County and our logs were coming down the Cowlitz River to the rafting works there and I was looking after the rafting of the logs. I first met Stewart in 1911 or 1912. I lived in Kelso for about two years after I came there in

1911 or 1912. I was not engaged in the logging business during all that time. The company with which I was connected was not a borrower at Stewart's bank, nor have I ever been a borrower from that bank. Stewart was an agent for the Northern Life. I do not know whether he invested money for them at that place. I did not know until afterwards that at the time of his death there was a mortgage of \$2500.00 payable to the Northern Life; that the money had been paid into Stewart's bank, but that the money had not been paid to the Northern Life. That has since been told to me, but I had no knowledge of it on March 17, 1921.

Stewart got home on the night of March 16th about midnight. Mrs. Stewart, my wife and myself had not gone to bed. When Stewart arrived, the four of us had a conversation which lasted about an hour. I presume I was in the bank a good deal on the day of the 16th. I made that my headquarters all of the time, back and forth. I was writing [187] insurance in Kelso on the 16th, but do not remember whether I wrote any policies on that date or on the 15th or 14th. I do not remember when I arose in the morning of the 17th of March. I don't remember how soon I got down town after I arose. I have no definite way of determining how long it was after I came down town when I saw Carl Hayes. I know that I met him about the middle of the morning. I told him that there had been a discussion about the automobile between Mr. and Mrs. Stewart. I told him what the 124

(Testimony of Frank J. Sardam.)
discussion was, and then told him to take it to
Portland.

- Q. Now, Mr. Sardam, you have been very much interested in this case, have you not?
 - A. Only as a friend. I naturally would be.
- Q. Well, you have taken quite a little interest in this case?
 - A. What do you mean by that please?
- Q. Well, let us start the other way around. I show you a letter dated March 23d, addressed to the Mutual Life Insurance Company and signed apparently by Frank J. Sardam, General Agent, and ask if that is your signature? (Handing witness paper.)
- A. Yes, sir. However that "General Agent" should not have been put on there. That was the stenographer's mistake. I didn't write in the capacity of general agent for the Northern Life Insurance Company. That was strictly a personal request of Mrs. Stewart that I do those things for her.
- Q. Now you wrote a like letter to the Prudential Insurance Company, didn't you?
 - A. I notified all the companies.
 - Q. You notified all the companies? [188]
 - A. Everybody, ours and everybody.
- Q. I notice in this letter you say that some of the companies have agreed to make settlement in event that the body is not found if bond is furnished by parents, relatives and friends. "I can assure you that such a bond will be furnished you should you

require it." Do you remember that part of it?

A. What is that again? Let me see that please.

(Paper handed to the witness.)

- A. Yes, that—one of the attorneys said that the case—
- Q. Just a moment. I ask you: That is there, is it not?
 - A. It speaks for itself there. It is there.
- Q. Now will you tell me which life insurance company it was or which life insurance companies it was that had agreed if a bond was furnished they would pay?
- A. No life insurance company that I know of agreed to do such a thing.
 - Q. And yet you wrote this letter—
- A. I said "if" if you will note there, "if a bond is required" which is the thing that had been put up to me by the attorneys—
- Q. Now, wait a minute. You wrote this letter under your own signature and said some of the companies had agreed to make settlement in the event that the body is not found—
 - A. I did no such thing.
 - Q. What?
- A. No. I didn't say they agreed to. I said "if" under certain conditions and I still say so.
- Q. All right. Let us hear it again. What company was it or what companies was it?
- A. You are trying to fasten something on to me. [189]
 - Q. Yes. I am trying to fasten something on you

as having written these insurance companies in an endeavor to get them to pay something by your telling them that other companies had agreed. That is the purpose. I will declare that frankly. Now I want to know what company to your personal knowledge had agreed to make settlement of these claims in the event the body was not found and if a bond was furnished?

A. Why, no, certainly there was no bond furnished. The import of the letter and the intent of it was that if they required a bond before they would make settlement, that that was what Mrs. Stewart would furnish.

- Q. What I am asking you now is what companies agreed? A. None.
 - Q. None. All right.
 - A. That is not what the letter says.
 - Q. Now the letter will speak for itself.
 - A. Sure it will.

I wired Mr. Langhorne on February 9th at San Francisco concerning this case. I cannot say whether the telegram I sent on February 9th to Mr. Langhorne concerning Fred Stewart's personal appearance was charged to the Northern Life Insurance Company or not. My stenographer might have done it. I did not. I sent no telegram personally to Mr. Langhorne. The telegram shown me dated February 9th was not sent by me. I would not say that the person who signed my name to that telegram was not authorized to sign it.

Q. Then did some one have authority to sign this telegram?

(Testimony of Frank J. Sardam.)

A. Oh, by inference. Your stenographer signs your name occasionally to letters. [190]

I didn't know that such a telegram was sent until it was sent. Probably the next day, I am not sure of the date. I was not in Portland the day it was sent. I think my stenographer sent the telegram. The information contained therein was not within her personal knowledge. The way she was able in the telegram to describe Stewart's personal appearance—that he had pale blue eyes and light brown wavy hair—was that my stenographer called up Mrs. Sardam over the telephone and secured the information. I didn't know that the telegram was charged to the Northern Life Insurance Company.

It was between eight and nine o'clock when Stewart telephoned me from Goble. I imagine it was nearer eight than nine. He said he would be home in forty minutes. When he first started talking to me his voice sounded rather high pitched. I knew when we reached Kelso the Saturday night previous to March 17th that there was trouble with the bank. It was about an hour after I heard from Stewart at Goble that I had the conversation with Stuart, the prosecuting attorney. About an hour after the last conversation I went to Kalama.

Mrs. Stewart was not living at my home in Portland on February 9th at the time the telegram was sent. She has been in my home in Portland since March 21, 1921, once or twice since I am sure. Before I went to Portland I was living at Tacoma and Mrs. Stewart visited us once at Tacoma since

(Testimony of Frank J. Sardam.)

March 17th, if I remember right. I do not remember how long she stayed.

I sold the automobile which Mr. Hayes drove to Portland. [191]

Redirect Examination.

(By Mr. LANGHORNE.)

I secured, net, to Mrs. Stewart for the automobile \$1490.00. When the bank at Kelso failed I had on deposit there six or seven hundred dollars. I got Stewart's grip when I went to Kalama. I found it at the Northern Pacific station which is right at the slip. Someone had opened it. I took it to Kelso. I would explain the matter of the accident policy.

There is a perforated card attached to these policies and I believe it is customary when they buy such a policy at the station to tear off and mail the perforated card to the beneficiary, and that is the one which Mrs. Stewart received. It was not found in the grip.

It was thereupon stipulated by and between counsel that an accident policy of the kind just mentioned was issued to Stewart on March 17th at the time he bought his railway ticket.

(Mr. Sardam continued:) I am the general agent for the Northern Life Insurance Company in the State of Oregon and my business calls me away from Portland frequently. I know that Mr. Langhorne, one of counsel for plaintiff, was in California in February at the time counsel for defendants were taking depositions of witnesses in California.

(Testimony of Mrs. Frank J. Sardam.)

I did not receive a telegram from Mr. Langhorne, but found it on my desk when I came home. I also found the telegram of March 9th herein referred to and which is an answering telegram.

Mr. RUPP.—In order to make it intelligible I will offer this telegram. [192]

Mr. LANGHORNE.—I am going to offer it in just a minute, myself. That is all, Mr. Sardam.

Testimony of Mrs. Frank J. Sardam, for Plaintiff.

Mrs. FRANK J. SARDAM, being first duly sworn, testified on behalf of the plaintiff as follows: (By Mr. LANGHORNE.)

The knowledge I have concerning this telegram which was sent to Mr. Maurice A. Langhorne at the St. Francis Hotel, San Francisco, on February 9th is that Miss Lockwood, Mr. Sardam's stenographer, called me up over the telephone and said a telegram had come from Mr. Langhorne and asked me what she should do about it. I asked her to read it to me and I said it ought to be answered, and she said, "I don't know how to answer it." I said, "I think I can describe him." And she said "How shall I send that now"? and I said, "You better send it C. O. D. because Mr. Langhorne is paying all the expenses."

Testimony of Dr. F. A. Byrd, for Plaintiff.

F. A. BYRD, being first duly sworn, testified on behalf of the plaintiff as follows:

(By Mr. LANGHORNE.)

I live at Olympia, Washington, and I have lived there since April 1, 1919. I am the Chief Medical Advisor to the State of Washington. I have been engaged in the practice of [193] my profession since 1899. I am a graduate of the Missouri Medical College of St. Louis, Missouri. I have lived in Cowlitz County from January, 1904, until I was called for army service about January 1, 1918. I lived in Kelso during the fourteen years I lived in Cowlitz County. I was county coroner of that county for a while; I was elected one term and filled out an unexpired term. I held the office three and one-half or four years. I think I may have been elected twice and filled out an unexpired term; I am not absolutely positive. Practically the whole time I was in Cowlitz County I was surgeon for the Hammond Lumber Company; they had camps along from Oakpoint up as far as Carrol's Point, which is over a distance of thirty miles, I judge, and I had a boat that was partly furnished by the company that I might go up and down the river and look after their injured men, and I was on the river a great deal during the time I lived in Cowlitz County. I would say that the Columbia River is more than a mile wide between Goble and Kalama. and the river at that point is very deep because the boats that can come into the Columbia River can

(Testimony of Dr. F. A. Byrd.) go up the channel there. The largest warships afloat which can get into the mouth of the Columbia River go up there.

Q. While you were county coroner and while you were down there practicing as a physician did you take any note or have you any knowledge as to how many persons were drowned in the waters of the Columbia and Cowlitz Rivers whose bodies were never recovered?

A. I couldn't state as to the exact number, but there were quite a large number that were never recovered. I can recall of one instance in the Cowlitz River. I remember very distinctly of a smelt fisherman by the name of [194] Galloway dropped off the back of his boat, slipped off, not to exceed 25 feet from shore, and we never recovered him and that was in water not to exceed 15 or 18 feet at that time, but quite swift.

I remember a number of other instances, just how many I could not say, of bodies that I had records of. I kept a scrapbook and I put all the clippings from newspapers in and in my file so we could use them for identification in case the bodies came in the big boom at the mouth of the Cowlitz River because the current hangs on the Washington side, striking Carrol's Point and leaving the Washington side below Mount Solo, and it is within that dstrict that we used to get most of these bodies.

I remember a case of where a girl named Mabel Londo and a man named Parker Day were driving at high speed across Columbia Slough. There was

a curve in the bridge and they didn't make the curve—went through the railing—and the automobile was found the next morning. Neither of the bodies was found. Many months after that I and an Indian got the girl out of a tree on Cottonwood Island. The bridge which I have just referred to is just opposite Vancouver, close to where the Union Meat Company's plant is now, and from Vancouver to Carrol's Point would be something like forty miles, and I got her off of Cottonwood Island, right opposite of Carrol's Point. She was up in a tree. She had come in there on the high water. The water receded and left her up in the tree. The body of Day, so far as I know, was never found. This accident happened while I was living in Cowlitz County and during the time I was County Coroner. I lived in Kelso seven or eight years after this particular accident. [195]

I have tried on four different occasions to resuscitate and bring back to life the bodies of persons who have fallen in either the Columbia or Cowlitz Rivers; I never succeeded. One of the bodies had been in the water about eight minutes, another about thirty minutes and the other two about ten minutes. The reason it was impossible for me to resuscitate these bodies was that the waters were so cold that the capillary circulation coagulates immediately and you can't re-establish the circulation by virtue of the coagulation in the capillary circulation.

The COURT.—Is that a coagulation caused by the coldness of the capillaries?

The WITNESS.—It is a coagulation. I tried to bleed some of these patients and I couldn't get anything from them at all. The blood would not flow, and it should not do that so shortly after death.

I was acquainted with and a personal friend of Fred Stewart's during the entire period I lived in Cowlitz County. I corresponded with Stewart before I left Texas and I came directly to Kelso from Texas and the same day I arrived in Kelso I called on him at the bank. We were bachelors together for a number of years until I married first, and shortly after that then Mr. Stewart married. We lived in the same block. We bought a block and he had half of it and I had the other.

I have gone to the beach with Stewart in the summer time. Stewart did all his swimming on shore. He never went in the water.

I do not think that if a person, heavily clothed, went [196] in the Columbia River on the night of March 17th, a thousand feet from shore, the river being 12 feet out of the banks and the water cold, as cold as I have described, that he could possibly survive. I think it would be too far for him to attempt to swim even if he was a good swimmer. I know something of the condition of the bottom of the river. There was a little child fell off of the boat at the mouth of the Cowlitz River at Moore's Mill, and there was a diver by the name of Brady from Portland came down.

The water is about 30 feet deep I think, and Brady told me that when he came to the child the child was standing upright leaning with its arms across some big heavy trees that were in the bottom and that he had been around this child a half a dozen times and could not find it because it was in between these cross trees and it was standing upright with just its head in its arms up over the shoulders and that the bottom of the river was just one mass of trees and stumps.

Another time at Oakpoint a lady fell off a launch just in front of the Hammond Lumber Company's store and a diver (I don't remember his name) came, I think, from Astoria and searched a day and part of an evening. He found this body eventually and he told me when he came out it was an old forest, looked like it had been at some time a canyon and the trees were standing and the stumps were there, some of them were ten foot snags, some of them 20 or 30 feet, because the water is very deep at Oakpoint.

Another case I remember a young fellow by the name of Fielder fell off of one of the towboats just above Kalama a little ways and they fortunately found his body by dragging, but he was fastened behind a stump and they got the stump and the body. I don't know whether they pulled the stump out at [197] the same time, but he was snagged to the stump so they told me.

I also remember an Indian who was fishing up above Cottonwood Island. I don't remember his name, but we never got this Indian boy. (Testimony of Dr. F. A. Byrd.) Cross-examination.

(By Mr. KEENAN.)

The manner in which I got acquainted with Stewart when I lived down in Texas is this: An engineer in a cotton gin named Nelson worked for an uncle of mine in Texas, and he went to Washington a number of years ago and run an engine for one of the shingle mills in Kelso. He returned to Texas. In a conversation with him one day he found I was coming out to Washington, altho I had no intention of going to Kelso at that time. Nelson gave me Stewart's name and the name of Judge Daniel Kelley. I wrote to these two gentlemen and as a result of the correspondence with them I came direct to Kelso. I secured this position that I referred to with the lumber company in the latter part of the first year or the first part of the next year after I reached Kelso. I did that work until I was called for army service. I was in the army from January, 1918, until I went with the State in 1919. Since that time I have been with the State. During all that time I was in Kelso with the exception of a few months in the east taking post graduate work and the time I was in the army, I had contracts with logging companies for their medical service. I also did a general practice. I am now the head of the Medical Department of the Department of Labor and Industries. That department used to be called the Industrial [198] Insurance Department. I have charge of the work of every

(Testimony of Dr. F. A. Byrd.) man that is injured in industries in the State of Washington that carries a hazard.

Q. Have you any idea the number of persons that were drowned in the proximity of Kelso since you came from Texas whose bodies have been recovered?

A. I have not seen the books, no sir, since I turned them over to my successor, but there was quite a large number of them because we had quite frequently a case, or to make a guess at it I would say I must have had probably forty or perhaps fifty, there might have been more than that, in that length of time that were recovered.

I was in Kelso from the latter part of January, 1904, until in January of 1918. There were lots of bodies that were recovered and there were lots of them that were not recovered. I think it would be safe to say that there were more recovered than not. Of the instances which I mentioned only one was drowned in the Cowlitz River. I remember in addition to the case of the man and girl who were drowned in the Columbia River at Vancouver and the Indian boy at Cottonwood Island, another case where three persons were drowned at the falls on the Willamette River just below Oregon City. One of the bodies was recovered but the other two I never heard of them being recovered. The drowning in that case took place on the Willamette River but the bodies come out in the Columbia River. I cannot say how much of an effort was made to recover the two bodies just referred to. I know,

however, that this couple that went over the bridge near Vancouver, they had a diver employed and he found the automobile. He hunted for the bodies [199] but did not find them. I can't say how much of a hunt took place as I was not present.

Q. Did you ever hear of a drowning in the Columbia River from Vancouver down to its mouth where the river was searched by every known means for eighteen days by some fifteen or twenty different people and boats; did you ever know of a body being searched for like that before?

A. Well, I don't know as to the number of days. I remember some of the cases where they dragged for bodies and had divers, but they didn't get them in the upper river. I remember this particular instance very distinctly of the case I refered to in the Cowlitz River that at that particular time there was a number of smelt fishermen and a lot of the citizens around town went and searched for the body, but they never got it.

I couldn't tell the number of days the search continued as the incident took place long ago. I know there was a diligent search made for the body. The forest I have talked about in the bottom of the river was in the Columbia River, right opposite Oakpoint. They fish on the Islands just in front of Oakpoint except in certain seasons of the year, and then they use what they call floaters. I know about the fishermen in the proximity of Kalama employing divers to go down there and pull up snags for the fishing season.

Q. Do you think the men went down there and pulled up snags?

A. No, that is too deep for fishing. I have seen them do that near Kalama, but the water is shallow there. [200] That is on the island in front of Kalama.

Q. Don't they fish across the main channel of the Columbia?

A. They have certain grounds that they call drifting grounds and the fishermen go out there and take away the snags. They put down a large drag and then it hangs up they drop a buoy and after they get all these snags marks then they go back and pull them and clear off these grounds so that they can drift down through that district or that particular piece of ground they clear, and they use what they call a diver. It is a net that floats right alongside the bottom.

Q. Which side of the river is on that?

A. It is in the channel.

Q. Not right in the center?

A. No. The channel down there is not in the center.

Q. How far out from the Washington side do they do that combing for the snags at Kalama?

A. At Kalama the channel is over on the other side of the river from where this body found in—

Q. I am asking how far is it from the Kalama shore where they do this combing.

A. There is an island right in front of Kalama. I have forgotten the name of it. There used to be seining grounds in front of that island. I don't

recall seeing any drifting ground right along Kalama there except that floaters. They might have used divers there. I am not positive about that. But I have seen floaters come down through there. I know just below this island on the Oregon side a number of men from down around Kelso used to go up there to fish and they cleared a ground there in the channel, but that is on the Oregon side. [201]

I have never succeeded in resuscitating any person who fell in the Columbia River in the State of Washington. I have resuscitated two people from drowning in Texas, in warm water or in little lakes. These two cases were white children. I do not recall ever having seen children or adults swimming or bathing in the Columbia River at Kalama and vicinity.

The method I used to resuscitate is first I drain them, open their glottis to see that there was a free passage of the air. I have even gone so far as to pass a rubber tube down into the lungs and breathe and exhale from my own lungs into them to try to get them back. I have used hot water. I breathed my own breath into one young chap in Kelso one evening for more than an hour. He was in the water five minutes. And he was placed immediately into a warm bath and he was given hypodermics and I gave him my own expiraton and respiration down into his lungs through a tube, and he was not brought back. I don't know whether that had anything to do with his not being resus-

citated, but it certainly did get air into his lungs. Oakpoint is a little better than twenty or twenty-five miles down the river from Kalama.

The COURT.—You spoke about Mr. Stewart not swimming when you were down at the beach. You went down to the beach you say?

The WITNESS.—Yes, sir.

The COURT.—You swim, do you?

The WITNESS.—Yes, sir.

The COURT.—Was there anything said by him to you regarding his swimming?

The WITNESS.—Yes, sir; he told me on occasions that he could not swim, and I know one time when we went to the beach [202] I insisted on his going in with me—it happened to be a very warm day and I insisted on him going in the beach with me, and he wouldn't because he couldn't swim.

Redirect Examination.

(By Mr. LANGHORNE.)

The Cowlitz River is very much smaller than the Columbia River.

The COURT.—In high water is the Columbia swift?

The WITNESS.—Very swift; yes, sir.

Testimony of William J. Pomeroy, for Plaintiff.

WILLIAM J. POMEROY, being first duly sworn, on behalf of the plaintiff, testified as follows:

(By Mr. LANGHORNE.)

I live at Kalama and came there in 1893. On

March 17, 1921, I was captain of the ferry-boat, the launch "Queen" plying between Kalama and Goble. The photograph handed me is a fair and accurate representation of the part of the boat shown in the photograph. This side here was open on that side. It was open from here on this side that day. It was not sealed upon the outside there.

(Whereupon the photograph referred to was offered in evidence, without objection, and the same was received and marked Plaintiff's Exhibit 9.)
[203]

I knew Fred Stewart of Kelso and had known him a good many years prior to March 17, 1921. I was pilot on the boat on the night of March 17, 1921. I was running the boat at the wheel. My station was here in the pilot house. The photograph now shown me is a fair and accurate representation of as much of the boat as is shown.

(Whereupon the photograph referred to was offered in evidence, without objection, and the same was received and marked Plaintiff's Exhibit 10.)

I had been pilot on this boat for six or seven years before the 17th of March, 1921. I remember the last trip I made across the river on the night of March 17, 1921. The train was due at Goble at 8:54; it was a little late, maybe about eight or ten minutes. I saw Mr. Stewart on the boat that night. I saw him as the boat was pursuing its way across the Columbia River; he was right in front of me on the port side. There were six passengers on board the boat that night; six passengers, Mr. Shotswell

light.

(Testimony of William J. Pomeroy.) the helper and myself. I know who the passengers were but don't know the names of all of them. There were three cruisers, Mr. Chisholm, Mr. Stewart and a drummer. I saw Stewart as the boat was pursuing its way across the Columbia. He was right in front of me on the port side. On the way across Stewart handed Mr. Shotswell a dollar. Mr. Shotswell handed the dollar to me and I gave him the change. Mr. Stewart kind of hesitated, put the change in his pocket, stepped over the pack sacks which the cruisers carried on their backs and which were piled right in front of the pilot-house, and walked around on the starboad side and went into the cabin. Before Stewart [204] stepped over the pack sacks Mr. Chisholm was inside the pilot house and was standing up behind me. Stewart as he walked around was walking at a pretty good gait. I should judge at the time Stewart disappeared from my sight we were in about the center

Q. How long does it take you to cross the river?

A. About, well, the schedule is about ten minutes, nine or ten minutes.

of the river. We were this side of the Government

The river that night was, I should judge, about ten or twelve feet higher than normal. The boat when we reached Kalama pulled up to the usual place where I discharged the passengers. The photograph just handed me is a fairly accurate representation of the condition that existed there that night when the boat pulled up to the railing to (Testimony of William J. Pomeroy.) let the passengers off. Two boats are laying side by side.

(Whereupon the photograph just referred to was offered in evidence, without objection, and received and marked Plaintiff's Exhibit 11.)

When the boat got to the railing the passengers went ashore. I was standing in the window. The passengers had to pass by me or jump over the railing. The passengers all passed out but Stewart. I noticed his absence. I raised the alarm. I hollered up to Captain Reid and asked him if Mr. Stewart had come on to the slip. Captain Reid said "No, sir." I then took my spotlight and searched the boat thoroughly. I couldn't find him. He left his grip in the pilot-house and [205] I took it up and check it in the depot. The Captain immediately telephoned to the sheriff and the sheriff came and we went down the river and looked for him to see if we could find a coat, hat or something. The sheriff put in his appearance about ten minutes after Captain Reid telephoned for him. There was no one with me when I searched the boat. Mr. Shotswell was standing outside. The little cabin where the passengers go and sit down I should judge to be about twelve feet from the partition. Referring to the little platform on the rear, I should say there is about four feet between the door and the rail. There is a light in the cabin right in front of the stove about three feet from the rear door. This light is a six candle power, five watt, light. I recognize the photograph just shown

me. This photograph shows the slip that leads up to the land. There is a light at the top of the slip and there is one down almost to the bottom. Both lights are 100 candle power. The landing is well lighted. There was no way for anyone to get off the ferry-boat without jumping.

Q. Explain what you mean by that to the Court.

A. In climbing over he would have to come close to me and it is about three feet across.

Q. Across to what?

A. To where he would have to get across or else come around by me. There is a space.

Q. Now, when the boat got to the landing did Mr. Shotswell get out and hold the boat fast?

A. He was there with a line and tied it up on a cleat.

Q. Did he tie it up with a line or-

A. Yes, sir. [206]

Q.—did he hold it? Shotswell was facing which way then when he went out and when he tied the boat up, if you know?

A. Well, I couldn't exactly say which way he was facing.

(Whereupon the photograph above referred to was offered in evidence, without objection, and received and marked Plaintiff's Exhibit 12.)

Cross-examination.

(By Mr. KEENAN.)

I saw Mr. Stewart get on the boat at Goble. He was on ahead of the other passengers. I think I

was about half-way across the river when he paid his fare. The fare is twenty-five cents. Stewart gave Mr. Shotswell a dollar and I gave him back seventy-five cents. Mr. Stewart paid his fare shortly after the other passengers paid their fares. Shotswell had turned in all the other fares before Stewart paid his. Then Mr. Shotswell went back to where Stewart was and Stewart paid afterwards. Stewart was standing out in front of the pilot-house when he paid Mr. Shotswell. He was in plain view of me at the time when he handed Shotswell the dollar.

- Q. Were some other passengers standing there to see it also? A. Yes, sir.
- Q. How many passengers were there to see him give that dollar over to Shotswell?
- A. This here traveling man and one of these cruisers and Mr. Chisholm. [207] The traveling man remained in front of the pilot-house all the way across the river.
- Q. And one of the cruisers stood by him also all the time coming across?
 - A. He didn't stand by him.
 - Q. Stood by the pilot-house? A. Yes.
- Q. One of the cruisers was out there all the time you were coming across?

A. I think he was.

When I am coming into Kalama I have to watch my moorings to see that the little boat doesn't strike the piling and I of course do the piloting to get the boat in. That night I was tying the "Queen" up

to the ferry "Elf." As we ran alongside Shotswell got out and throwed the rope around the cleat. At the time we landed the wind was blowing downstream. When the wind blows downstream it makes the water rough, but I have seen it rougher than that. If the wind is blowing upstream then it would be rough.

- Q. But blowing down it does not change the surface unless something runs against it?
 - A. It changes it.
- Q. And of course as you landed and as the rain was falling and the wind was blowing the passengers naturally hurried off and up the slip, didn't they? A. Yes, sir.
- Q. And of course, Captain, on that night, the same as other nights you never count the passengers when they get off do you? [208]
 - A. I generally know who is on.
- Q. I mean now you do not as a matter of fact stand and say, "One, two, three, four, five," do you, when they get off? A. I just take a glance.
- Q. Yes. You sort of know intuitively the people that are on there without counting them?
- A. There ain't so many; there ain't so big amount of travel.
- Q. But as a matter of fact, Captain, you never count them as they get off?
 - A. Sometimes I do. Not often.
- Q. What would be the occasion for your counting them occasionally?

- A. I count them there to see how many tickets are sold to check up with the cash.
- Q. There was not any occasion to do it that night because you only had six? A. I knew.
- Q. You knew just how many got off without counting?
- A. That is true. I seen them before I left the shore. I knew how many I had.
- Q. Now, Johnny Chisholm, how does he compare in size with Stewart? (Mr. Chisholm, will you stand please? A gentleman stood.) In height I mean; in height and size.
- A. Well, in height and size there ain't much difference.
 - Q. And Johnny walks pretty fast too, doesn't he?
 - A. Sometimes.
- Q. And Stewart walked pretty fast sometimes too didn't he?
 - A. He did that night, yes. [209]
- Q. He did that night. Now Paul was busy tying and holding the boat as the passengers jumped off, of course, wasn't he?
 - A. Well, he was standing right there at the rail.
- Q. I say he was busy with the rope tying and holding the boat?
- A. No, he was not busy standing holding the rope all the time.
- Q. I will put it another way. Now, when do the passengers get off in relation to your going up to the slip?
 - A. Well, in relation to the going up to the slip,

(Testimony of William J. Pomeroy.) you come in and land and make the boat fast and then they start piling off.

- Q. Yes, as a matter of fact they pile off before you stop, don't they?

 A. Well, I have seen cases.
- Q. And if it is a stormy, windy night they are anxious?
- A. Oh, if it is a stormy, windy night you never see them making a break.
- Q. Was it so stormy and windy that night that they could not get off the boat until you tied it right up snug? A. No, not that stormy.
- Q. So it is customary that the passengers that come over there to jump right off the little boat just as soon as you get up to the slip or up to the ferry, if you tie to it, and don't stay there and visit with you then?
- A. Some of them just step ashore. They don't jump. There is no occasion for them to jump.
- Q. You never saw any of them jump? They step off lively?
 - A. Yes I have seen them step off. [210]

On that night I think that Chisholm got off and went up the slip right behind the cruisers. The traveling man followed about the same time. I believe that Chisholm and the traveling man followed the cruisers up the slip. The cruisers' pack sacks were right in front of my pilot-house. The cruisers did not come out before the boat landed, get their packs together and put them on their shoulders. two of the cruisers were inside, one was out there. Of course, he picked up his sack. The other two

came out afterwards, just as I was coming in. As soon as I stopped they had their sacks ready to go.

- Q. Plaintiff's Exhibit 11 being a photograph of the "Queen" and the ferry-boat to which she was tied, has been taken looking from the front of the "Queen" backward.
- A. Yes, sir. He was standing on the left when that was taken.
- Q. Now I am showing you this railing, is that the railing on the "Queen" or on the "Elf"?
- A. They are both there together. That is the end of them. Here is the end of them.
- Q. Now that railing, the railing on the "Elf" and the railing on the "Queen" are almost exactly the same height? A. Yes, sir.
- Q. Both railings were jammed right up together there at that point?
 - A. No, sir. The picture shows it that way, yes.
 - Q. How far apart were they?
 - A. Right there they were three feet apart.

The COURT.—Three feet apart on this night? [211]

The WITNESS.—No, sir. Every time I land there.

I do not mean there is any structure which keeps the boats apart. The boats where the cleat is were together—the boats were not straight on the side. The railing is right at the end of the cleat, or to put it in another way, the cleat is at the end of the railing. The cleats were about two feet apart when we tied up the two boats, and the railings then were

two feet apart up at that point. Of course, they would get farther apart as we went back. The railing is about 2 foot six in height.

(The witness was then shown Defendants' Exhibit "B" for identification. Defendants' Exhibit "B" for identification. is a fair picture of the two boats from the rear.)

I was in the pilot-house when I pulled in.

- Q. And if a man had gone around the cabin on the "Elf" to the place where a man is now standing whose picture was taken, could you have seen him from where you were in the pilot-house?
 - A. Yes, sir.
 - Q. Just where the man is standing now?
 - A. I couldn't look through that house, no.
- Q. That is what I am asking you. You couldn't see him, could you?
- A. No, I couldn't see him on that other boat; no sir, I couldn't see him.
- Mr. LANGHORNE.—He understood you to say could he see him when he got over there.
- A. (Continuing.) —I could see him when he got over that. [212]
- Q. But my question is if a man was standing where that man apparently was standing when the picture was taken you couldn't see him from the pilot-house, could you?
 - A. No, I couldn't see him.
- Q. Now when you were in the pilot-house which way were you looking? A. Up this way.
 - Q. Up toward the top?

- A. Around this way. I was standing—the house is in a circle and I was standing leaning out this way.
- Q. In relation to your pilot-house where did the passengers leave your boat that evening?
- A. Right across the front of these two boats. That is not the position the boats set in.
- Q. The passengers that night left your boat in front of the pilot-house? A. Yes, sir.
 - Q. They all went off that way? A. Yes, sir.
 - Q. And that is the direction in which you looked?
 - A. No, sir.
 - Q. Which direction were you looking?
- A. I was looking right around this rail here to watch whether they all came out.
- Q. You say they came out in front of the pilothouse?
- A. They do have to pass the pilot-house or else climb over that rail. Where are they going to go when they climb over that rail?
- Q. I haven't got to that yet. You are anticipating me. Now there is a space between the pilothouse and the cabin, isn't there? [213]
 - A. What do you mean; a walkway?
 - Q. Yes. A. Yes.
 - Q. I believe you said it was about four feet?
 - A. No.
 - Q. How much is it?
- A. A little over two feet; I guess two feet and a half.
 - Q. And there is a door on either side of the cabin

(Testimony of William J. Pomeroy.)
going in from that walking space into the cabin
isn't there? A. Yes, sir.

Q. Now then where did the passengers come from as they left your boat; did they come through that space between the pilot-house and the cabin or were they out on the side here ready to alight or ready to land as soon as you tied up to the "Elf"?

A. They came out this door.

Mr. KEENAN.—I will get another picture.

Q. How much space is there between the pilothouse and the railing on the side?

A. You mean the space clear to the side of the boat?

- Q. Yes, where people would stand?
- A. I judge a little over two feet.
- Q. Captain, I am calling your attention to the testimony that the space between the pilot-house and the cabin on the boat "Queen" is between two and two and one-half feet?
 - A. I don't get you on that.
 - Q. I am asking you about the space here?
 - A. You mean the space between the two boats?
 - Q. No, I don't. This is your pilot-house?
 - A. Yes, that is the pilot-house. [214]
 - Q. And here is the cabin? A. Yes.
- Q. And you say there is a space in there of two and one-half feet between the two structures?
 - A. Well, where you walk around on the boat.
 - Q. That is what I am asking you.
 - A. Yes, where you walk around.
 - Q. Now, where else would you expect to see the

passengers as you landed that night excepting to the side of your pilot-house there as they stood waiting for you to land that they might step off?

- A. You can see all around. You can see that door.
- Q. I am not asking you about seeing there. Where would you expect to see the passengers to stand that night and where did they stand that night as you pulled up to the "Elf"; didn't they stand right up to your pilot-house ready to step off?
- A. Some of them were there and some of them were in the cabin.
- Q. You just said that the cleat was at the end of the railing? A. Yes.
- Q. And that even that was two feet away and that where both boats touched was towards the point of both boats, up toward the point of the "Queen"?
 - A. No, you have got me wrong.
 - Q. All right.
- A. Where these cleats come together here I should judge there is about two feet, but between the boats here that way is about—

Mr. KEENAN.—That is the rear he is speaking of. [215]

- A. —Is about three feet.
- Q. I understand that, but answer this question.
- A. The boats are together right where the cleats are, the boats are together.
- Q. Tell me what part of the "Queen" was the nearest to the "Elf"?
 - A. The nearest to the "Elf"?

. Q. Yes, what part of the "Queen" was the nearest?

A. The "Queen" I should judge would be about a foot and a half from that cleat.

Q. On the "Queen" there is a timber around towards the water line projecting out to protect your boat from striking the piling and other obstacles as you land, isn't there? A. Yes, sir.

Q. It goes clear around?

A. Just a deck, that is all.

Q. How far is that out—

A. The deck overhangs I should judge about 14 or 15 inches.

Q. I am now calling your attention to Plaintiff's Exhibit 9 and I am directing your attention to a projection near the water line here of the timber that goes clear around. How far out does that project from the side?

A. About three inches.

• Q. Did you measure it?

A. Well, it is the width—it ain't much wider than that one before.

Q. Did you measure it, I say?

A. Well, the whole thing measured I think about four inches.

Q. Yes; not three but four inches then, isn't it?

A. Well, the cabin setting out on top of part of it. [216]

Q. And on that night there was no glass in the windows; they were open with canvas on them?

A. All of them.

The COURT.—What was that answer?

Mr. KEENAN.—No windows in. It was canvas. These openings look like windows. There were no windows in. It was canvas.

Mr. LANGHORNE.—Where was that?

Mr. KEENAN.—On the side.

Mr. LANGHORNE.—Oh, not in the pilot-house.

- Q. How far was this first opening that looks like a window from this rear platform; how many inches? A. Which is that?
- Q. From the first opening that looks like a window to— A. How far over there?
 - Q. How far over there?
 - A. That there it seems to me is about three feet.
- Q. On the right-hand side of the boat the window was much nearer, wasn't it?
 - A. No, they were both the same.
- Q. Don't you recall telling me when I interviewed you some time ago that this space was boarded up since then?

A. Well, that is on the starboard side.

Mr. LANGHORNE.—The right side you mean? The WITNESS.—Yes, sir.

Mr. KEENAN.—On the right-hand side?

The COURT.—I understood him when the picture first went in that he said this was what was boarded up.

The WITNESS.—This one right here running from here to there is boarded on the inside. They didn't have any boards to put on them and it has been put on since. [217]

Q. It was open then?

A. It was open then, but it was not open clear through; it was boarded on the inside. You see it is boarded on the inside and outside, but the outside was not boarded. There is two inch and a half studding goes up between.

Q. What do you say, Captain, about a person stepping over this rear rail at the rear platform, holding onto these windows here and walking on this timber projection, which you say is four inches wide; could that be done?

The COURT.—You say "walking forward," and vet you draw your finger back on the boat.

Mr. KEENAN.—Well, walking forward.

A. It might be done.

Q. You have done it yourself, haven't you?

A. No, sir. The only ones I have seen do it I will tell you, the people there that had been in swimming.

Q. What is this little—

A. That is a chock; it is a cleat inside the cabin to tie the boat.

Q. Didn't you ever have occasion to go from the front or from the rear platform here to attach a rope onto this? A. No. sir. I do it all inside.

Q. You could do it if it was necessary, couldn't you? A. No, sir.

Q. Why?

A. Because how am I going to hold on.

Q. Couldn't you hold onto the windows?

- A. Yes, but how am I going to make that line fast?
- Q. But you could walk from one end to the other, holding on to the windows if you wanted to? [218]
 - A. I wouldn't tackle it.
 - Q. You could do it, couldn't you?
- A. I suppose if I was forced to do it I would, but I wouldn't tackle it.

Mr. LANGHORNE.—Just to clear up, that would be the right side of the boat as it came in to the dock, wouldn't it; that would be the side lying towards the Oregon shore?

The WITNESS.—That would be the side, yes, towards the Oregon shore.

The COURT.—You say you would have only about three inches of footing?

The WITNESS.—Right here, yes, sir. That is what they call a guard and it is about three inches wide.

- Q. You said also it was four inches. Now, explain what you mean.
- A. Well, it is four inches, but the boarding is put up on top of it, so that it would leave it stick out here about three inches, so that is all you would have to stand on.

When I landed that evening some of the passengers went off the boat faster than others; they did not rush off. Mr. Stewart's bag was just there behind; I didn't have to look for it. I missed Stewart before I noticed the bag. He left it there and he didn't go ashore and I noticed it. He didn't

come ashore so I knew it. I told Shotswell that Mr. Stewart's grip was there. I then called up to Captain Reid and said, "Jack, did you see Stewart come up the slip"? He said "No." I said, "He was on board." I said, "His grip is in the pilothouse." Then the Captain went up and telephoned [219] to someone. Then I and the deputy went to the hotel to interview these three cruisers. I did not go into the room: I stood at the door. The deputy sheriff Hogett was with me. The sheriff himself did not go with me, it was his son. There were only two of us at the door. I asked them if that fellow that walked back after went out the other door and they said "Yes." I asked them nothing more. They said he went out the door and didn't come back. I believe the deputy sheriff asked the same questions I did and received the same answers. No one of the cruisers at that time told me that they followed Stewart out of the rear door of the cabin. My purpose in going up there was to get such information as I could from them as I had to make a report.

Captain Reid is the owner of the boat. He was not on the boat but he was at the head of the slip, the only person I remember being around there, and the people on the boat. There was nobody on the "Elf."

The COURT.—After you missed Stewart did you go around the "Elf" before you went up the slip? A. I went around my boat.

The COURT.—You went around your boat?

The WITNESS.—The line was about eight feet between them, so he would have to jump about eight feet to get ashore.

The COURT.—Did you speak to Stewart that night on the boat?

The WITNESS.—Yes, sir. I spoke to him when he got aboard at Goble. I did not speak to him afterwards. I didn't go up after the baggage at Goble; I stayed on the boat.

There is only one slip at Kalama from which anybody could go up to get on top. The light that is down below in the slip [220] would be about forty feet from my pilot-house. The light is in front of the windows of my pilot-house. There was a light at the foot of the slip and one at the top. My pilot-house when I stopped was just about opposite the slip about like it is in the picture.

Redirect Examination.

(By Mr. IMUS.)

Captain Pomeroy, you were shown a picture yesterday by the attorney for the defense and which you stated did not show exactly as the boats were landed. You may explain to the Court in what way the picture did not show the true condition of the boats as the relation of the "Queen" to the "Elf" the one that you were examined on yesterday.

A. The one I was examined on yesterday you see they dropped down.

Q. They were lowered out. And as to the stern of the boat?

A. As to the stern of the boat, the boat was laying slack. The photograph just now shown me clearly represents the position of the "Queen" and the "Elf" on the evening of March 17, 1921, at the time I missed Fred Stewart.

(Whereupon said photograph was offered in evidence, without objection, and received and marked Plaintiff's Exhibit 13.) [221]

Q. Now I will ask you about how far apart were the two boats at the front end of the passenger cabin; how far was that from the "Elf"?

A. The passenger cabin where you come out the door was about seven or eight feet. At the time the passengers got off on the night of March 17th I was looking kind of on both sides. The photograph doesn't show the door of the cabin as they came out. It shows the window. No one could have passed from the "Queen" to the "Elf" without my seeing them during the landing of the passengers. The depth of the water from the rear of the "Queen" at the place we landed, to the wharf, is I think about fifteen or sixteen feet.

Q. What would be the distance from the rear of the "Queen" to the shores of the wharf?

A. Well, the ponton is 14 feet and the "Elf" was 22 and about six or seven feet between.

I landed at Kalama that night between nine and nine thirty. I believe there was a passenger train that stopped at Kalama that night.

I keep track of the time of the arrival and departure of trains. I cannot say exactly what the

schedule time of the train going toward Portland from Kalama was. I think I have a time-table with me. It seems to me that this train passed through Kalama going to Portland before the "Queen" landed that night. My time card shows that the train did pass through Kalama at 8:45.

Q. Now you were asked regarding a person walking around on the side of the "Queen" from the bow of the boat. Do you think a person could hang on to the side of the boat [222] there when the boat is in motion when it is raining like it was that night?

A. He would be just taking chances.

I left to go to the hotel to see the three timber cruisers after Sheriff Hogett came down to the wharf. Sheriff Hogett remained at the wharf and there were others there at the wharf by that time.

Recross-examination.

(By Mr. KEENAN.)

The life-preservers on the "Queen" are carried in lockers on the inside of the boat and then some piled outside in the stern on the platform.

Redirect Examination.

(By Mr. LANGHORNE.)

I could not tell how many life-preservers were on the boat. I believe that the life-preservers were counted after Mr. Stewart was missing. I could not say whether any were missing.

Testimony of Paul G. Shotswell, for the Plaintiff.

PAUL GRANT SHOTSWELL, being first duly sworn on behalf of the plaintiff, testified as follows: (By Mr. LANGHORNE.) [223]

I live at Kalama and have lived there for three years. Last March I was purser on the "Queen" which is a boat plying between Goble and Kalama. I remember well the trip I made on March 17, 1921. I knew Fred Stewart and had known him for about fourteen years. The "Queen" left Goble on the Oregon side for Kalama at approximately nine o'clock. It takes the boat fifteen minutes to make the voyage from Goble to Kalama. The Columbia River is about one and a quarter miles wide at that point, but as our boat would not go straight across we were running about two and a quarter miles. I should imagine it is about a quarter of a mile from Goble to the point of the island where we go towards Kalama, then we go up the river probably three-quarters of a mile or half a mile. Mr. Fred Stewart was a passenger on the boat which left Goble at nine P. M. I saw him that evening before the boat left Goble. I didn't talk to him before that time. After the boat left Goble Mr. Stewart was on the front deck in front of the pilot-house. I marked with a letter S. on Plaintiff's Exhibit 11 the place where Stewart was standing soon after we left Goble. Stewart had not bought a ticket. He had been standing out on the front of the boat. He was (Testimony of Paul G. Shotswell.)

pacing back and forth on his right-hand side facing the rear and all of a sudden he stopped. I had collected the fares but didn't bother him because I had heard the situation and knew he was in trouble. And he quit pacing all of a sudden and gave me a dollar. I went into the pilot-house and got the change from Mr. Pomerov and came out and handed it to him. He put it in his pocket. There was a large sample case and between the sample case and the railing there were three knapsacks piled one on top of the other which would bring it up about three or four feet. Stewart placed one hand on the knapsack, [224] vaulted over and walked rapidly back to the cabin, and that is the last I saw of him. Now here was the man standing here at the time. The knapsacks were between the sample case and the railing of the pilot-house, and he couldn't go around that space without going over it. He jumped over the knapsacks.

When we landed at the Goble Oregon side Mr. Stewart was standing on the slip. He was walking up and down before we approached there. When we landed there Captain Pomeroy spoke to him and asked him how he got there and he said he 'came down in a taxi. Mr. Pomeroy asked him if he had been waiting long and I don't remember the reply. Mr. Pomeroy stayed on the boat and I went up and waited on the train and came back and we started across the river after putting the baggage aboard. Mr. Stewart, myself

(Testimony of Paul G. Shotswell.)

and I think the traveling man and one of the cruisers was on the forward part of the deck. When we got about half-way across, sometime between there and the shore, Mr. Chisholm left the deck and went into the pilot-house with Mr. Pomeroy. I had pointed out Mr. Stewart to the traveling man and told him about the situation. After we got about half-way across the river, Mr. Stewart paid me his fare and went back into the cabin and that is the last I saw of him.

When we reached the slip at Kalama I saw Captain Reid standing at the top of the slip in plain view. I stood there with one hand on the railing. I do not remember tying the boat up. I may have done so, but if I did I don't remember. I do remember, however, standing there holding the boat with one hand. What I mean by that is that I had one hand on the railing keeping it close to the other boat. I always did that, stand there while they went off and helped [225] them with their baggage if they needed it. I noticed all the passengers go off except Mr. Stewart. I then looked up at Mr. Pomeroy in the pilot-house. Mr. Pomeroy then hollered up and asked Captain Reid who was standing at the top of the slip if he had seen Stewart come off. Captain Reid said "No." Then I started looking. I saw the traveling man go by from the boat and I hollered and asked him if he seen Stewart get off and he said "No." Then the four of us went through the boat, Pomerov having a flash light. After that we went up to (Testimony of Paul G. Shotswell.)

the depot and Captain Reid called the sheriff and I believe the county coroner. He said that Stewart had disappeared crossing the river. I could not hear, of course, the reply but I do remember that Reid said that the boat had been searched; that he was standing at the top of the slip and didn't see him go by.

The boat to which my attention has been called is the "Queen." The photograph is a fair and accurate representation of so much of the boat as is shown in the photograph. The person standing there holding the boat with one hand is myself. That is the position that I assumed that night. Stewart did not get off the boat that night while I was there, I don't believe.

(Whereupon the photograph just referred to was then offered in evidence, without objection, and received and marked Plaintiff' Exhibit 14.)

The first person who got off the boat that night was Mr. Chisholm. He is a brother-in-law of mine by marriage. I do not remember when the drummer got off, but I do remember the three men going up side by side. We made no stops crossing the river. [226]

Cross-examination.

(By Mr. KEENAN.)

I formerly lived with my folks in Kelso and went to school there for about eighteen months. My folks and Mr. Stewart were at one time good friends, in a business way. He would accommodate my father and mother with loans. I felt under (Testimony of Paul G. Shotswell.)
no obligation to him. I moved about twelve times
between the two places over the lapse of about
twelve years.

I saw Stewart on the slip at Goble when we got over there. I saw him get on the boat. Five other passengers counting Mr. Chisholm, got on. I usually start to collect fares as soon as the boat starts. I do not remember collecting Mr. Chisholm's fare. The reason I volunteer that statement is because Mr. Chisholm is a brother-in-law of mine and a personal friend of Mr. Reid's. I did collect the fares of all the other passengers. I do not remember whether I got tickets from the cruisers and drummer or money. About three minutes after I brought the fares collected from the other passengers to Mr. Pomeroy I got Stewart's fare.

Q. Of course as to the time that intervened between turning the fares of the first passengers in to Pomeroy and the time when you collected Stewart's fare is largely a guess, isn't it now? A. No.

Q. Well, how do you fix the time exactly?

A. I collected the fares from passengers immediately on leaving the dock as soon as we got in the river, but I didn't collect Mr. Stewart's until he voluntarily gave it to me.

Q. I am asking you about the time. I am not asking you [227] about the fares at all. I am asking you about the time that intervened between the collection of the fares from the first three or four passengers, maybe five, turning it in to Pomeroy,

(Testimony of Paul G. Shotswell.) and then going to Stewart; I am asking about the time that intervened?

- A. Approximately three minutes.
- Q. That is merely a guess on your part, isn't it?
- A. I didn't have a stop-clock. I couldn't tell.
- Q. Please answer my question. It is merely a guess on your part, isn't it? A. Yes, sir.

I said on my direct examination that we were about a half to three-fourths of a mile from the Oregon shore, when I collected Stewart's fare. It was about the same distance from the Washington shore.

I remember making an affidavit to be used as proof of death. I don't remember whether or not in that affidavit I stated that we were about a thousand feet from the Washington shore when I collected Stewart's fare. I presume I knew as much about the distance we were from the Washington shore at the time I made the affidavit, right after the accident, as I do now.

I think Mr. Chisholm was the first one off the boat when we reached Kalama. I cannot say who was the next. The three timber cruisers got off together. I do not remember whether the traveling man was ahead or behind them. I usually keep track of the passengers that get off the boat. I remember seeing you in Kalama a week ago to-day in the evening, but I was not on the "Queen" at all when you were there; I was on the "Elf." I do not handle the baggage until [228] the passengers are all off.

The COURT.—Did I understand you to say that

you heard Captain Reid say at any time that he did see Stewart go up the slip?

The WITNESS.—No, he didn't see him; absolutely.

Testimony of John Scanlon, for Plaintiff.

JOHN SCANLON being first duly sworn, on behalf of the plaintiff, testified as follows:
(By Mr. LANGHORNE.)

I live at Centralia, Washington, and have lived there nearly thirty-two years. I am a timber cruiser and have been such for twenty-five years. I am employed by the Weyerhaeuser Timber Company and have been so employed continuously for about seventeen or eighteen years.

I remember crossing the Columbia River on the steamer "Queen" on the night of March 17, 1921. The week previous I had been down on the Washington side at the Wisconsin Lumber Company's holdings. When I returned Raymond Schorer and H. L. Curtis were with me. Mr. Schorer has been with me in the woods steady ever since some time in January, 1920, 1921. Mr. Curtis has worked with me different times the last year. They were with me the night in March. I remember approximately that we boarded the "Queen" that night about nine o'clock. I stood out on the forward deck at first, but I remained there probably just a couple of minutes, only long enough to pay the purser. I went down in the cabin. There [229] was no one else in the cabin with me after I went down

there. But these two young men that I have spoken of followed right in afterwards. While I was seated in the cabin a man came down there, stepped in the cabin, looked around and went back up. After that another man came in the cabin. I think I can describe the whole situation best in my own way.

I walked into the cabin and sat down on the seat, picked up an old paper that was there, looked at it, reading. It was new to me. I hadn't seen a paper. in a week. The first gentleman who came in stood and just looked around and went back up. In a few minutes after—in just a short time after—another man came down who had a brief case or something that he carried in his hand, a tall man with a long overcoat on, and he stood and looked around The two young men that were with me they were reading these navigation regulation signs on the boat as I remember. This tall gentleman looked around, he looked at them, looked over at me, and walked right out of the door on to the stern of the boat. That is the last I seen of him. A few minutes afterwards the two young fellows they walked out the same door. This gentleman I just described didn't lay down the brief case in the cabin. He took it with him. A few minutes after the boat whistled for the landing, the two young men came back in and stood there for a second or two and walked up on deck. The boat was just coming into the landing and I don't remember just how long we stood there but we picked up our packs and put them

on and after the boat landed we stepped off the boat, walked up the wharf and as we started up the wharf one of the boys said to me, "Did you see that man come back into the cabin?" I says, "No, he didn't come back." "Well," they says, "he is in the river then," and I says, "Well, there must [230] be some place else he went," and they said, "No, there was no place else to go."

We walked from the boat landing right up to the hotel and went straight to bed. We all stopped in the same room. We got undressed and into bed and in just a very short time, why—I know I hadn't fallen asleep and I was pretty sleepy—somebody rapped at the door and the captain that was on the boat came up and asked us if we had seen this man go out the back door of the boat, and I told him, "No," we hadn't. Now I am a little ahead of my story. I told him, "Yes," we had seen him go out, but we hadn't seen him come back in. By the captain I refer to the pilot on the boat. I don't believe that it was over twenty minutes from the time we left the boat until Captain Pomeroy came to our room.

Cross-examination.

(By. Mr. KEENAN.)

Probably about thirty days after this accident I was interviewed by a young man concerning the accident, who said he was representing a life insurance company. To the best of my recollection the first time I was interviewed by anybody representing Mrs. Stewart was some time last July or August.

There were only two men who came to the room at the hotel that night. Captain Pomeroy and some young man. No one else came to our room that night, nor did I talk to anyone else about it. My impression is that we did tell Pomeroy or the young man; that Schorer and Curtis told Pomeroy and the young man with him—that they went out on the rear of the boat and they told me after we got off the boat that the man who [231] went out on the rear must have gone in the river. I did most of the talking to Pomeroy. I don't think that either Schorer or Curtis stayed out on the deck after I went into the cabin. If either one of them did it was just for a minute or so. The boat was only a short distance out from the shore before the purser came around to collect the fares. My recollection is that he came around after the boat left the wharf at Goble. I couldn't say how long Schorer and Curtis were out on the rear of the boat, but it seemed to me like they were out there maybe five minutes. There was a short time intervened between the time this tall man went out on the deck and their going out. I am just giving my impression as to about what the time was.

Testimony of Raymond Schorer, for Plaintiff.

RAYMOND SCHORER, being first duly sworn. on behalf of the plaintiff, testified as follows: (By Mr. LANGHORNE.)

I live at Centralia, Washington. At present I am engaged in running a compass for John Scan-

lon, and have been engaged in that occupation about fourteen months. I am 27 years old.

I remember crossing the Columbia River on the steamer "Queen" from Goble to Kalama on the evening of March 17, 1921. That day we had been up to the Wisconsin Timber Company's place and had a section of timber to cruise, and that day we started traveling in and came to Stella and ate supper and went over to Mayger and caught the train and went to Goble. [232] Mr. Scanlon, Curtis and myself got on the boat at the same time and stood on the forward deck until after we were out a ways. It was quite a stormy night and so Mr. Curtis and I went in the cabin. I don't remember whether Mr. Scanlon was in ahead or not, but we were all in there. About half way across this man I suppose was Mr. Stewart came in the door. He had somethink in his hand. He stopped and glanced in the engine-room door, looked up and went to the back door and went out. That was what I should judge about half way across the river. About what I thought was about four minutes or such a matter Mr. Curtis and I went out the back door. We hadn't been out there very long. About, oh, somewhere around two or three minutes the whistle blew for the landing, so we came back in the cabin and from there we went out and put on our packs. I didn't see anyone on the back platform when we went out there. The light shines through the windows in the rear door. While we were out on the back platform I asked Mr. Curtis if he seen the

man come back that went out. He said, "No," he never seen him. I said I didn't either, and didn't think much about it. I know he wasn't out there. We came back in and nothing more was said about it until we got off the boat and went up the slip next to the depot. We went on up to the hotel and went to bed and I suppose Captain Pomeroy and the sheriff, I suppose I didn't see him, came to the door and talked to Mr. Scanlon and he told him all there was to tell him.

I made no statement to anyone at the time about the man who went out on the back platform not being there. I made no search for him. I simply observed he was not there. After we had been out on the rear platform for about two minutes or such a matter, the whistle blew for the landing. I don't [233] know at this long distance of time whether we remained out there one minute or two minutes, or three minutes. I do not remember hearing anybody before I got off the slip calling to Reid and asking if Stewart went up. I didn't pay any attention to it. If anything like that was said I might have heard it.

- Q. Well, I say if you heard somebody call out that a man fell in the river while you were going up the slip you would not forget it at this short distance from that time would you? A. No.
- Q. So you are well satisfied now when you were going up the slip you and Mr. Scanlon and the other young man, that no alarm was given about Stewart being lost, was there?

A. I said I didn't hear it. I didn't say anybody didn't say it.

Q. Well, if you had heard it you would remember it, wouldn't you?

A. I don't know but what I would.

Q. And there was not anything about the weather or the wind that would prevent you from hearing it if the man at the top of the slip heard it, was there?

A. I don't see what it could be. I don't see what would prevent me from hearing it if the man at the top of the slip would hear it. [234]

Redirect Examination.

(By Mr. LANGHORNE.)

Q. If you were there? A. Yes.

I don't know how big the platform was at the back of the boat. It was kind of dark out there and I had never been on the boat before or since. I suppose the railing was about four feet from the rear door. The platform was about four or five feet wide.

The COURT.—What were you and this other boy—Curtis was his name?

A. Yes, sir.

Q. What were you doing while you were out there; were you smoking or talking or what were you doing?

A. We were just kind of restless and standing around inside and so we just went out there and that is about all that was said.

The COURT.—You stood there and watched the river or what?

The WITNESS.—Yes; just walked out there and looked around.

The COURT.—Did one of you stand on either side of the door or do you remember what your position was when you were out there?

The WITNESS.—We just walked toward the back railing and stood at the back railing.

The COURT.—Did you put your hand on the railing?

The WITNESS.—Yes, I put my hand on the railing I know.

The COURT.—Stood there a little while and then turned around and went in; is that it?

The WITNESS.—After the whistle blew for the landing; yes, sir. [235]

Testimony of William J. Pomeroy, for Plaintiff (Recalled).

WILLIAM J. POMEROY, being recalled, testified on behalf of the plaintiff as follows:
(By Mr. LANGHORNE.)

I couldn't say how far from the shore I sounded the whistle. I generally sound it where the fish house is, just about four or five hundred feet from my landing place.

Cross-examination.

(By Mr. KEENAN.)

It would take me about one minute to run in from there.

Testimony of H. L. Curtis, for Plaintiff.

H. L. CURTIS, being first duly sworn, testified on behalf of the plaintiff as follows:
(By Mr. LANGHORNE.)

I live at Centralia, Washington. I have lived there for twenty-one years. I am twenty-one years old. I was one of the party which came across with John Scanlon on the "Queen" on March 17, 1921. We boarded this boat at Goble. It was after dark. I should judge about nine o'clock in the evening and we stood around the forward deck until the boat pulled off from the landing, then we entered the cabin towards the back of the boat and we were standing in there, I think we were talking or reading the signs on the walls, when some man, a tall fellow with a dark overcoat and a brief case in [236] his hand came walking through and he stopped and glanced around the cabin and went through the back door to a little back deck in the rear end of it. A little while afterwards Mr. Schorer and myself went out to see what was there. That was our first time on the boat and we wanted to see. We couldn't find this gentleman that passed out. We didn't see him out there, and I think, it is my impression, that we spoke of it at the time that he had not gone back in the cabin and wondered where he was at, and we came back in in the space of four or five minutes I should imagine and then I think we left the cabin for the deck and picked up our packs and after the boat had stopped at the dock

(Testimony of H. L. Curtis.)

we went up the slip or the wharf to the hotel and I think we spoke on the wharf about this man being missing; we hadn't seen him come back from the small deck on the back part of the boat. We went to the hotel and went to bed and in a short time two men came to the door and inquired whether we had seen this man on the back and Mr. Scanlon answered the call and it is my impression he told him that we had seen him go back and we hadn't seen him come back into the small deck—he hadn't come back into the cabin. And he asked our names, if I remember right, and I think Mr. Scanlon referred him to the register in the hotel. That is the last that was said about it.

Cross-examination.

(By Mr. KEENAN.)

I could not say when the other passengers got off relative to my getting off. I do not remember whether we timber cruisers were the first ones off. I cannot say how many people got off ahead or after. I couldn't say whether anyone else was on the slip as we went up; I didn't notice. I don't believe that as I went up the slip an alarm was given about a man being lost in the river. If any body had called up from the boat to a man on the slip saying in substance that [237] that a man was lost off the boat, I would have heard it at the time.

With reference to the intervals of time which I have given, I would say that they are not guesses but they are merely my impressions of the time.

(Testimony of H. L. Curtis.)

I am not accurate as to the time. I do not remember that about the time I got to the door and looked out over the water I heard the whistle blow for the land. I don't remember hearing the whistle. I am pretty sure that Schorer and I spoke about this man not being on the rear deck, but I couldn't repeat the exact words. I don't know what they were. I think it was raining when we went out there. It was a bad night. I don't know whether the wind was coming towards the boat; I couldn't say.

Testimony of Louis M. Plamondon, for Plaintiff.

LOUIS M. PLAMONDON, being first duly sworn, testified on behalf of the plaintiff as follows:

(By Mr. LANGHORNE.)

I live in Woodland, Washington, and have lived there since 1912. I am a country banker and have been such since 1905. Woodland is about twenty miles from Kelso. I have lived at Woodland since 1912. Before that I lived at Kelso. I first met Fred Stewart in the summer of 1903 at Kelso. I came in very frequent contact with Stewart. I think I was intimate with him.

I made a report to Mr. Hay the bank commissioner as to the condition of the Kelso State Bank. Mr. Carothers was [238] president of the bank on the 16th of March, 1921. I was in Woodland on that date. I didn't get a telephone communication from Mr. Carothers on that day, but I did on

the 15th. As a result of that telephone communication with Mr. Carothers I telephoned the banking department in Olympia and followed that up by sending a telegram. As a result of these communications I went to Kelso on the evening of the 16th meeting there Mr. Carothers, Mr. George Plamondon and Mr. Claude Hay. So far as I know Stewart had no knowledge of the fact that Mr. Hay was coming to Kelso that night. It was not the purpose to give Mr. Stewart any knowledge of that meeting, but to keep it from him. I was not in consultation with Stewart either on the night of March 16th or March 15th. I was in Kelso on the evening of the 16th.

Stewart was a difficult character to describe. He was a very sensitive man and a man whose chief characteristic was pride. He was very touchy and very proud of his own judgment. He was always right in business matters particularly. From my observation I would sav that he couldn't meet trouble or disaster very easily. I found that out from previous experiences with him. I might further say that he was not resourceful in meeting trouble. He served in the State Senate I think along in 1908, 1909 and 1910. I am not sure of the date. It was before that. He was succeeded as Senator by Senator Adams. I very frequently traveled with Stewart. I know what his habit of carrying money with him on his travels was. He very seldom had enough cash with him to take care of his personal expenses. He and I were very

much the same in that respect. Very often I would have to borrow five dollars from him and he the same from me. The last time he and I were in Tacoma together he borrowed ten [239] dollars from me at the Tacoma Hotel. When traveling he paid his bills by check always. I don't believe I ever saw him with more than fifteen or twenty dollars in cash on his person.

I don't know whether it was the intention when Mr. Hav came down to close the bank. We had been figuring on taking the bank over—several of us had figured on a reorganization of that institution if it were humanly possible to reorganize and thus save the institution. That is what we had been working for and had been working for for some time. After my examination I came to the conclusion that the amount of money that we had available, which was \$50,000, plus the entire liability of Mr. Stewart to the Kelso State Bank if all paid in, would not have saved the institution and my judgment was borne out by the liquidating agent later. The report which I made to Mr. Hay should have reached him about the Monday morning previous to the Thursday of the closing of the bank. Looking at the paper handed me I see it is dated March 14th. That was Monday, I think. My report was then mailed to him on Monday and should have reached Mr. Hay the Tuesday morning previous to the closing of the bank. Mr. Stewart knew that the report had gone forward to Mr. Hay, but didn't know what was in the report. He

had not seen my findings and conclusions. The papers now handed me are a true copy of the originals which are in Olympia. I turned these copies over to Mr. Langhorne.

(Whereupon the document referred to was offered and admitted in evidence, without objection, and received and marked Plaintiff's Exhibit 15.) [240]

Cross-examination.

(By Mr. RUPP.)

I am the brother of George Plamondon who testified in this case yesterday. Mr. Carothers who was the president of the Kelso State Bank is the father-in-law of George Plamondon. I was not present at the meeting in Chehalis on March 6th at which time Claude Hay was present. I was told that at that time or on the following morning an assignment of 100% had been levied on this bank. The reason that the report concerning which I have testified was made to Mr. Hay is that my crowd was considering the purchasing of the Kelso State Bank if there was any possibility of keeping the bank going. The motive for making the investigation of the bank was to ascertain whether or not the recapitalization of this bank was an advisable proposition. I am a stockholder in the bank at Woodland, Woodland being about twenty miles from Kelso, and am the president and cashier of that bank. It would not be a good thing for the bank at Woodland to have the bank at Kelso fail. Mr. Carothers, George Plamondon and myself ex-

amined the Kelso State Bank. Stewart knew that we were making this examination. He was present and knew the purpose for which we were making it. We discussed all the paper of the Kelso State Bank with Stewart. I was requested by the State Banking Department to advise them as to what I found in the bank and I told Stewart that either the copy of the report or the original report would be sent to Mr. Hav. I knew when I started to make the examination of the bank that Mr. Hay on March 6th had requested that Stewart resign as cashier of the Kelso State Bank. I didn't advise Stewart of the exact date when I mailed the report to Mr. Hav and never discussed the report with him. In fact, after the examination [241] I never saw Stewart again. I concluded my examination of the Kelso State Bank about two o'clock Sunday morning prior to the closing of the bank. I worked all day Sunday compiling this report and completed it and mailed it Monday. I was working at my own bank on Sunday. We started working at the Kelso bank on Saturday afternoon and worked there until about one or two Sunday morning, after which I drove home and compiled this report in my own office. I was in Kelso on the evening of the 16th and had a conversation there, at which conversation Mr. Hay, Mr. Carothers and myself were present. Mr. Hay came from Olympia in the evening on a train which is called, I think, the eight o'clock train at Kelso. I came down to my brother's house and Mr. Carothers, Mr. Hay and

my brother were there from a little after eight until a little after ten. Shortly after ten Mr. Hay stepped to the teelphone, called Stewart up and said he would like to see him at the Kelso bank. Mr. Hay immediately went up town and that is the last I saw of Mr. Hay that night. I was not at the Kelso State Bank. I had no business there. I knew before March 16th that the State Banking Department had criticised the management of this bank. I had known for several years that the Kelso State Bank had been criticised by the State Banking Department. I had had some talk with Stewart off and on about the criticisms made on this bank by the State Banking Department. Stewart always laughed at the criticisms made on the Kelso State Bank by the State Banking Department. I was connected with the Kelso State Bank from 1905 to 1912, part of the time as bookkeeper and part of the time as assistant cashier. My brother had been in the Kelso bank several years prior to the time I ceased to be connected with the Kelso bank. [242]

Redirect Examination.

(By Mr. LANGHORNE.)

Stewart always thought the Kelso State Bank was solvent.

Recross-examination.

(By Mr. RUPP.)

Q. Do you mean to say that on the 16th day of March, Stewart thought this bank was solvent?

A. That was his attitude, sir, all the way through.

Q. That is what he said?

A. Well, his appearance generally bore it out until the last few days prior to the closing of the bank when the man was practically physically all in.

Testimony of Maude E. Stewart, in Her Own Behalf.

MAUDE E. STEWART, being first duly sworn, testified on her own behalf, as follows:
(By Mr. LANGHORNE.)

I live at Kelso, Cowlitz County, Washington, and have lived there since August, 1910. I married Fred L. Stewart on the 14th of August, 1910, at American Falls, Idaho. I immediately removed to Kelso. American Falls, Idaho, is where my parents live. I was born in Walla Walla and lived there until 1909. I went to Kelso to teach at that time. My father's name is Ezra Zaring. [243] When I married Mr. Stewart he was cashier of the Kelso State Bank and that was the same business he was engaged in on the 17th of March, 1921.

I recall a visit made to my home which Mr. and Mrs. Sardam made on the Saturday preceding the 17th of March. They were my intimate personal friends. I met them, I think, first in 1911. They had been down a short time before the middle of March and had just gone home, then I wrote them asking them to come back. My reason was that after Mr. Stewart came home from Olympia on March 6th he was absolutely a physical wreck and I was considerably worried about his condition.

The Sardams were our best and closest friends and I wanted someone with moral support to talk things over with and I therefore asked them to come down and be with us. Mr. Stewart was in a very, very nervous condition from the time he came from this conference at Olympia, absolutely unstrung. He was extremely pale, ate very little, slept very little. I recall the events on the night of March 16, I cannot tell when Mr. Stewart left the house that night. Mrs. Sardam and I had gone to one of the neighbors and when we came back Mr. Stewart was not home. He had told me that he expected to go down to the bank and do some work that evening. When he came home it was near one o'clock. We were watching for him; we had not retired. When he came in he was on the verge of a collapse. He said, "I am afraid they are going to close the bank. There is only one more chance. Mr. Hay has asked me to go in and see Mr. Collins with him in the morning and we are going in on the five o'clock train." It was about 4:40, I should judge, on the morning of March 17th when Mr. Stewart went downtown. I got up about four o'clock made coffee and tried to persuade [244] him to eat a little breakfast. He had slept absolutely none during the night. He didn't want any breakfast, but I finally persuaded him to take some coffee. Then he opened his brief case and asked me to sign a deed that he had there. I think that was a deed to onefourth interest in the farm and I think the deed

was made out to Mr. Plamondon. I signed it. Just before he left he went into the room and took our little boy up out of his bed, then he went to the door and he came back three different times. I have not seen Mr. Stewart since he left that morning. I received a letter from him the morning of the 18th of March, 1921. The envelope just handed me is the envelope in which the letter came. The letter contained therein is the letter which I received. Mr. Sweeney, the lady sitting back there, is the person who brought that letter to me.

(Whereupon the letter was offered and admitted in evidence, without objection, and marked Plaintiff's Exhibit 16.) [245]

Plaintiff's Exhibit No. 16.

"March 17, 1921.

Dearest Girl:

I think I have everything fixed now but I just learned that they intend to close the bank and I don't know what they intend to do next. Looks as tho they were determined to put me out of business. I am going home by way of Eadem this evening with enough money to stop any ordinary trouble. Collins wouldn't do a thing and I didn't really expect him to, but Hay wanted to try it anyway.

The whole thing has made me sick and I feel shaky, but think I will make it all O. K. If anything should happen to me remember that I have \$86000 of life insurance policies in the vault in your favor and about \$50000 of accident policies all paid

up to date. I want you to collect it all and have the Sardams help you. Make up to them any loss they have if they should have any.

Take care of the following obligations of honor out of it also please.

out of it also please.	
1st a bond I have used out of the Richter	
estate of which I am administrator,	
in the sum of\$16	0,000.
Also 3 of \$500. each or a total of	1,500.
2 notes of Huntingtons which have been	
paid off	1,000.
and (which I was under bond for and	
had the money	7 50
to help our business)	
respectively, making a total to Rich-	
ter estate of 13	3,250.00
Also 2 notes indorsed to old Mrs. James	
of 1	,200.
Also 1 note to Mrs. Lean Bozorth of	
(Carr)	600.
and 1 to Mrs. Jennie Rogers of approxi-	
mately 2	2,000.
and 1 to J. H. Rogers of balance of	800.
and 1 to the bank of my own of (John-	
son) 6	6,000.

\$36,050.00

being notes of the Kelso Farm Co. which I am responsible for, making a total of \$36,050. I don't

note) 6,250. and 2 to the bank of \$3750 and \$2200.00. 5,950.

and 1 to the bank (Fisk memorandum

think of anything else except what the banks and individuals have security for.

This should leave you plenty for you and Sam. There is a memorandum will in our box in the vault but this action of the people about the bank nullifies it to quite an extent and I figure they will take all our property and you will have to leave any debts to be taken care of as they shall determine out of the same. There is also a sealed letter of instructions in the box but it covers this same ground, and if you get it better read and destroy it. It was only written in view of what I feared they might do to get me out of the business. If you can get the money from the Northern Life on one of their policies, or both in time to do it better take me down to Riverside to be buried next to my brother and where the old folks will want to be ultimately. The other policies will be paid to you slower no doubt. Don't have the old folks come up if you can avoid it. Go down there to them and stay with them as much as you can, as they will need you and the little man to cheer them. Your car is at Stevens 531 Washington Street. He will sell it or keep it for you. It is your. [245a] The California land was deeded back to Mother for the place mext to ours and the deed to it was made out to Ford but he will probably turn it into the bank. He was to cancel our \$1000.00 note and grocery bill and give us the change out of the \$3500.00 for it, but I presume that is off. Give them a deed to our home if they want it and reserve your furniture if you want it, and they will let you. Our timber tract sold

to the Alger Lbr. Co. has an equity of \$62,000.00 in it but they will take it, and everything else except what is covered by mortgages. I thought we were worth \$200,000 and that the bank was solid as Gibralter but after the Plamondon report we are not worth anything except what you keep out of my insurance money. Don't let the old folks turn any of their property as they are not responsible except for the assessment of \$500.00 on their stock. Have them send in the stock with the \$500.00 and let it go. Do the best you can to bring Sammy up right. I wouldn't let him go in the banking business as it is one lifelong worry and fight.

I haven't been able to do very well for you but I have done the best I could at all times and if they had let me alone we would have been on easy street for everyone this spring.

This is all I can think of now. Of course if I get home with the money and can get by this trouble all this should be destroyed and forgotten.

You have been the sweetest wife any man ever had and I love you always. Try to keep Sammy and the folks from grieving all you can.

With all the love in the world, I am

Yours.

FRED."

Since the receipt of that letter I have not heard nor seen Mr. Stewart.

I owned a car at the time Mr. Stewart left on March 17th. After Mr. Stewart came back from the bank the night of the 16th he said, "I am afraid they are going to close the bank. If they do we don't know what may happen." He said, "We have absolutely

nothing." He said "The car is yours and I wish you had it some place where you can get something out of it," and he said "I want you to send the car to Portland and get something out of it." And the next morning I phoned Mr. Hayes and asked him to drive my car to Stevens' garage at Portland. [245b] About a week later there was so much gossip about where the car was, so I wrote a letter to Mr. Stevens and asked him to give it to Fred Hayes and ask him to bring my car back to the garage in Tacoma where it remained until it was sold.

When Mr. Stewart left on the morning of March 17th he wore a very dark brown sort of a mixed suit with a very narrow hair line red stripe in it, this stripe being rather indistinct. He also wore a sort of heather mixture overcoat, a grayish brown and very heavy woolly material, and had a stitched dark brown cloth hat. He carried with him a small bag and a brief case. I can't tell you exactly how long he had been carrying a brief case. I had given him a brief case for his birthday present about two or three years previous. He never went to the bank without it or came home without it. He carried all his papers with him. I never saw him start any place without this brief case. He carried it with him constantly wherever he was going.

About two days after March 17th, the envelope now handed to me and which appears to be addressed to me is in my husband's handwriting. I cannot be positive who brought the envelope to me. It was either Carl Hayes or George Plamondon, one of the men who opened the box at the bank. It

was my impression that Mr. Hayes brought it up, but I am not positive. The name signed is that of my husband and the handwriting at the bottom is his name. I recognize the figures in the letter as being in his handwriting.

(Whereupon the letter just referred to was offered and admitted in evidence, without objection, and marked Plaintiff's Exhibit 17.) [246]

Plaintiff's Exhibit No. 17.

PRIVATE MEMORANDUM.

Dear Wife:

If anything should happen to me before we get things straightened out I want to make these suggestions as to how to handle things for your best interests and those of everyone who have looked to me for protection.

You will find a will in the top of our box in the vault and papers in connection with the various properties we own in the box with it.

The debts to Messrs. Crouch, McKenney and Maurer are to be cancelled by the deed we have already executed conveying each a quarter interest in the ranch back to them. The equity in the timber should be turned over to the bank as they can carry the taxes and interest and realize from \$25,000 to \$40,000 from same on the Alger contract whereas you must not try to carry it out as it is too big for you I am afraid.

The main thing I want you to remember is that I have \$86000 of straight life insurance and about \$50000 of accident insurance and you should get this and deposit in *you* own name and keep it en-

anything to do with them. Get the Sardams to help you about the insurance money. You will be perfectly safe in depositing it in the Kelso State Bank if you make it clear that it is separate insurance money due you but if you go to California it would be just as well to take most of it with you. The bank people or the examiners department cannot hold you on the guarantee I have signed except as to our property and you will probably have to give that all up anyway.

The California forty has been deeded back to Mother in return for the place next door to us which has been deeded to Carothers.

One thing that must be taken out of my insurance money however as a debt of honor and as soon as you get it and with as little notice as possible and that is that I have used \$10000 in one bond and \$1500 in three others and \$1750 of notes belonging to the Richter estate and they must be taken care of immediately, in case of my death, out of insurance money. This would amount to \$14000, and there are about \$1200 of notes indorsed to Mrs. Julia James which should be taken care of promptly too, also a \$600 note indorsed to Mrs. Lean Bozorth, my own note of about \$2000. held by Mrs. Rogers, in her box in the vault in the bank, a note of \$800 with interest indorsed to John Rogers in his box (the Tom Word mortgage balance). Also a note of \$6250 representing Fisk's share of the Shillapoo money I put in, which I turned in as a memorandum note at the bank should be taken care of and

two notes of \$3750, and \$2200.00 respectively which I have been carrying at the bank in the name of the Kelso Farm Co. but which I am responsible for. If you take care of these promptly out of my insurance money together with any overdraft I may have it will leave everything I know of square at the bank. I took out \$2500, extra insurance for these items a few months since.

Let the outside banks take what security they have or wait during the period of administration.

All the guardianship and administrators accounts are all O. K. except the amounts used out of the Richters Estate which I gave bonds for, and was to replace out of the legacy coming to me from the east if we did not sell the land or timber first. [246a] One thing more for you to remember carefully is I had agreed to give up our stock in the bank which stands in my name, and you must not allow them to claim that it is yours and try to collect a dividend out of the insurance money. The stock is theirs now subject to the debt against it. Father will have to pay an assessment of \$500. on his but you can make it up to him on the insurance money if he will let you. Better have him turn it with his dividend and let them keep it.

If you want to act as administrator of my estate they cannot stop you as the law gives you that right during the first forty days after my death. You can have an allowance set aside for your support out of the estate if you wish. I don't know whether you would want to act or not. My estate will be practically bankrupt after losing out at the bank

and having to make 2,000 quickly on the things that I would have had plenty of time on if it had not been for this recent development and I figured we were worth \$200,000, but the best you can expect now is to have my record clean at the bank and keep \$40000 or \$50000 of the insurance money for you and Sam. Have the folks change their will so as to leave anything they were going to leave to me to you and Sam instead. Take as good care of them as you can.

If you decide to act as administrator stretch it out for the full year or longer in order to take plenty of time to dispose of the timber and other property to advantage, and get a friendly and reliable attorney who will not talk too much. Mc-Kenney is friendly but very leaky. Fisk is not entirely my choice either. I believe Mr. Magill would be about the best but dont think he can act in this state. You could have Bill Stuart or Judge Miller or Mr. Stone. If you dont want to act yourself you could let the bank itself be appointed. The main thing is to string it out so as to give the bank plenty of time to strengthen up without anyone finding out that I was being forced out on account of slow loans as that would be apt to react against the bank. It would make a good excuse for you to come back up here after a few weeks or a month or so and you could stay in Portland or Tacoma most of the time if it is too unpleasant to stay here.

Another thing I think you had better do is to take me down to Riverside to be buried with my brother

where the old folks will want to be later when they are thru. It will not cost so very much and it will take you away from here and to the old folks at one and the same time. You could turn the policies over to Sardam and let him get the proofs all ready and take them down there to you if it would be easier for you and I believe it would be. You could pay the expenses and have Frank and Hazel both run down with them.

None of this goes except in the event of my death of course. I am nervous and sick or I wouldn't write it. With love to you always.

FRED. [246h]

There were only a few things in the grip that my husband carried away with him on the morning of March 17th. He always kept a few things in this bag, a comb and brush, a few handkerchiefs and clean collars and a tie or two, and I believe there was generally a timber map that he carried with him a great deal. He so often went to Portland on short notice that he would just go up and grab his bag and hurry to the train. Those were the things that were in the bag when it was returned to me.

Cross-examination.

(By Mr. RUPP.)

I left Kelso on the 28th of March, 1921. I was back there from the 4th to the 18th of August, and I have been there since March 12, 1922. My husband discussed with me prior to the 16th of March the condition of the bank. When he came back

from this conference with Mr. Hay in Olympia he told me that they had asked him to turn over the control of the bank. He had really worried about the bank ever since we had been married. I knew that there had been criticisms that Mr. Stewart had been disturbed by, but he insisted always that if they would let him alone he could work it out. He himself was never discouraged about the condition of the bank.

Redirect Examination.

(By Mr. LANGHORNE.)

When I left Kelso on March 28, 1921, I went to Elsinore where Mr. Stewart's father and mother live. They are both [247] alive. His father is the old gentleman sitting in the courtroom. The reason I went is partly explained in the letter I received on March 18th. In this letter Mr. Stewart asked me to go to his people; they were old and it was a terrible thing for them, and I thought somebody ought to be with them so I went.

Q. Did anyone urge you to go?

A. There seemed to be nothing to do in Kelso. I had no people there and my friends thought it would be best to go away for a time.

Q. Were you being bothered by the depositors at that time?

A. There was considerably annoyance, yes.

I arrived in Elsinore on March 31, 1921. I then went north on the 14th of June, 1921, to visit an aunt at Los Altos— a little town about fourteen miles from San Jose. I arrived there on the morn-

ing of the 15th and stayed there until July 28th. I then took the train for Tacoma arriving there July 30th. I went to the Bonnerville Hotel. I stayed in Tacoma until August 4th, then went to Kelso and remained there until August 18th. I spent one night in Portland, left Portland August 19th and arrived in American Falls August 20th, where my father and mother lived, and remained there visiting until March 7th.

Testimony of J. W. Hogett, for Plaintiff.

J. W. HOGETT, being first duly sworn, on behalf of the plaintiff, testified as follows:

(By Mr. LANGHORNE.) [248]

I live at Kalama and have lived there about thirty-three years. I am sheriff of Cowlitz County at the present time. I was sworn in on the 13th of January. I was sheriff in March, 1921. I was in Kalama on the evening of March 17, 1921, at about the hour of 9:30 P. M. At that time I guess I was at the depot—the landing. Prior to going to the depot I was at Dr. Sims' place, at which place I received a telephone message from Captain Reid. He said, "Is this you, John?" I said, "It is." He says, "Stewart is overboard, went into the river." I says, "What Stewart?" He says, "F. L. Stewart, the banker at Kelso." I says, "Are you positive?" He said, "I am." I asked him if he had looked on the boat and he says, "We have; we have searched the boat and he is not there." And I said, "Well, I will be down." And later I met him at (Testimony of J. W. Hogett.)

the intersection just in front of the bank. He was just coming up; I think he was going over to the K. of P. Lodge that night, and I asked him there if he was positive that Stewart had went overboard, and he says, "I am." He says, "He didn't come off the boat." I asked him where he was going. He says, "I am going over to the K. of P. Lodge." He says, "I will be right back." I went down to the boat and in a few minutes he came down there. I don't think it would hardly be five or ten minutes. I just went right down, walked the block. When he arrived at the boat I had a talk with him concerning the people who came off the boat. He said that he was standing at the head of the slip when the boat landed. That there were three timber cruisers came off, Johnny Chisholm and a drummer. I said, "How are you positive that Stewart didn't come off; that he got by you?" He said, "No, he didn't get by me." So I says, "What can we do?" and he says, "You can take the boat and [249] go down the river along with me." He asked Pomeroy to take me down the river with a few more there. We went down along the river and I says, "We will go out about where you saw him last" to the boys. We went out there and I says, "Now, we will drift down to about where you think if any of his papers would come out of his brief case or his hat or anything would come off, just be floating along on the water, anything of that kind, we will go in there." There was a search-light on the boat; always have search-lights, you know; and we

(Testimony of J. W. Hogett.)

came back up the river and searched the bank all along good by the piling and the boom poles. Captain Reid was not with us on that trip. Captain Pomeroy was with us and managed the boat and the mayor of the town now, J. A. Clark, was on the boat. I don't remember exactly who were on the boat; there were several.

I have heard it stated that there have been several persons who have gone into the river whose bodies have not been recovered that I have heard of.

Cross-examination.

(By Mr. KEENAN.)

I first met Captain Reid on the street just out in front of the bank a little ways on the intersection of the street. I just paused there for a second or two. I think we were at the top of the slip at the time, and he told me the number of passengers that came off and named them. We were standing there during that conversation. I had three different conversations with Captain Reid. One over the telephone, one on the bank and one at the top of the slip. [250] Afterwards we went on the boat, my object in so doing being to investigate. I think I was standing at the top of the slip when Captain Reid came up to me. After I saw him in front of the bank he went to the K. of P. Hall and I went to the top of the slip and I was at the top when he came back from the Hall. I don't say how long I had been there. There were some people there I don't know just who they were. I don't know whether there was anyone else there to hear the re(Testimony of J. W. Hogett.)

mark of Captain Reid's as to the number of passengers who came up. Some other parties heard him mention when he phoned me. I don't recall any other person at the top of the slip.

I have heard of bodies that have not been recovered from the Columbia River. I have heard people talk that way. I recall bodies that I know of myself which have never been recovered. There are five that I am almost positive of. I never heard of their being recovered, and I am almost positive that they never were found that I knew.

Testimony of William Stuart, for Plaintiff.

WILLIAM STUART, being first duly sworn, testified on behalf of the plaintiff as follows: (By Mr. LANGHORNE.)

I live at Kelso and have lived there since December, 1918. I am the prosecuting attorney of Cowlitz County and have been such since December, 1919. I was at my home in Kelso on the evening of March 17, 1921. Captain Reid called [251] me over the telephone there somewhere between 9:30 and 9:45 that evening. He said, "This is Captain Reid at Kalama." I think it was Reid that called me. I know Reid and he said, "Fred Stewart has had an accident." I said, "Is that so, how is that?" He said, "He jumped off the boat and committed suicide." I asked him if he had told the sheriff and he said, "Yes, Sheriff Hogett." That is about all that was said. I did not go to Kalama that night. I think I went the following

(Testimony of William Stuart.)

day. I didn't see Reid. After I received this telephone call from Reid on the evening of the 17th I called Frank M. Sardam and Mr. Carothers, I think, the president of the Kelso State Bank; Mr. Sardam was Stewart's friend.

(No cross-examination.)

Testimony of S. S. Stewart, for Plaintiff.

S. S. STEWART, being first duly sworn, testified on behalf of the plaintiff as follows:
(By Mr. LANGHORNE.)

I live at Elsinore, California. I am Fred Stewart's father. I am eighty years old. I last saw my son alive in November, 1920. I have not seen him since. He had a brother, but he died years ago. He is buried near Riverside, California. My wife is living and is seventy-three years of age.

(No cross-examination.) [252]

Testimony of Chris Hansen, for Plaintiff.

CHRIS HANSEN, being first duly sworn, testified on behalf of the plaintiff as follows:

(By Mr. LANGHORNE.)

I live at Kalama and have lived there six years. I live at and near the Columbia River, and have for about twelve years. My occupation is that of diver. I have been engaged in diving about ten years in this country and two years before that. I am familiar with the bottom of the Columbia River in the vicinity of Kalama. I have been on the bottom of the Columbia River along in the vicinity of

Kalama down stream and across the river. Prior to March 21, 1921, I was working on the drift just below the old incline which originally first started pretty near where the oil station is and I dropped down to the lower end of the incline on account of big clay banks in there and snags that it was impossible to clear. The water runs all the way from 35 to 68 feet in depth about that time. The water on the 21st of March, 1921, was high being about twelve feet above normal; above low water in Portland. The bottom of the river starting in there and extending on through towards Goble and below is very rough in some places. It will form holes and banks different places, there will be piles of snags, that is trees what piles up, drift down with high water and eventually work a hole in the bottom of the river and they will stop there and they will bury up, which will take several tons' strain to pull them back out of the ground. These holes are met with just occasionally; they are not all along. You will find a hole; maybe there will be twenty feet, then you light on the ground and you walk along and pretty soon you [253] will go in and maybe go in 20 feet deeper, and then you get back up out of the hole again. Some of these holes are pretty large, some not very large, some not over fifty feet across, but they will be from 15 to 20 feet deep. On sandy bottom they extend pocket-shape, that is sloped, and if it is clay bottom why, the lower side will be pretty near level—or the top side and the lower side will go on a bank which may extend over

some places eight or ten feet you can get under in places. They extend upwards, upstream. The current beats underneath of them and it is too hard for the current to wash it off sloped, so it eats a hole under and it gradually falls off at the top. If a body should get down in one of those holes and the tide was flooding, it might get out. If it is not flooding I don't know how much chance there would be of its coming out.

Q. Explain to the Court why.

A. Why, because the current holds them in there and usually the snags will roll along and it is usually covered with snags, that is, logs and stuff, and eventually fill it up, you see, and that will form a big bank.

If you go down the river and across to Coffin Rock about one mile, the river is 180 feet deep. I have never been down to the bottom of that very hole. Below the hole I have been down where the cable crosses, a little above. I have been down one hundred feet. I usually find in these holes logs and whole trees and one thing and another like that. There will be quite a hole in the channel where the sand is. In one place there may be fifteen or twenty feet difference [254] and in a day or two afterwards you come back it will be just level there and the hole will be some other place. Mounds and ridges always form in there whenever the river rises; when it falls they fill up again. The bottom of the river where it is sandy and especially during the high water, moves. Sand will move so fast

down there it will bite your hands in the current. I can hear the sand moving in the water on my helmet. It is just like someone pouring a bucket of gravel different places.

The COURT.—Does the pressure of the air in your suit make things sound louder than ordinarily?

The WITNESS.—Well, no, that don't really do it. I don't hear anything unless it touches my helmet on account of the noise of the air and the pump.

I have an apparatus to register the depth I am down. The fellows on top, whenever I drop into a hole, can tell exactly what the difference in feet is. It doesn't make any difference whether I go straight down or slanting down. The apparatus shows the actual depth of the diver.

Q. Have you ever found bodies or anything down in the bottom of the river when you were down there? A. I have.

The only times that I can find them is when the water is very low. You take on high water it is no use, you can't work or you can't hardly stay there. And in quiet water alongshore mostly are the places where I can find them. After anything lays in the bottom of the river for a few hours [255] when the river is especially rising and muddy, the sand moving will fill it over, shove it into a hole probably and that hole eventually fill over if it lays any length of time.

I have been engaged in pulling snags out for the fishermen. We usually have to do that whenever the fishing season is on, whenever the fish goes in

there; that is when they fish in there or before. The water always brings in more or less snags and fastens them in these holes and there may be only a corner of them sticking out. I have found dead bodies in the Columbia River, I don't know exactly how many but about ten. I have seen two or three cases of where I had to break them loose to get them out. I went down one time in the mouth of the Cowlitz River to get a boy out. He was under a pile of snags, what I call trees and stuff filled in, and the boy was sitting down about like this (witness illustrating) hanging on to a limb and I had to break the limb off and break the limb out of his fingers to get him loose to get him out of there. Quite a few people have been drowned in the Columbia River whose bodies have not been recovered. I have never heard of finding some bodies which I have looked for for some time. I have looked for three myself which were never found. I saw one person drowned whose body was never found. This person was drowned above the mouth of the Columbia River in the last part of July, 1912. We never did find him and never heard of him. I was fishing at the time and picking up a net below where—about a quarter of a mile below a boat above me. This fellow was standing up in the stern of the boat and another man was picking up the net. He fell overboard and went down. I got my net loose and run up there. This fellow hollered and I never saw him any more. The river was pretty well up at that time [256] although

it was falling. A year after that a man by the name of Lederel and a man by the name of Boldy Wright came from Washougal. Lederal fell overboard in the same place and never was found. When the water is high it is swifter than when it is lower. There are also more whirlpools. These whirlpools in the bottom stir the sand up. They are so strong that you can sometimes hardly hang on; so strong that when the river gets to that stage it takes two men to hold the line on top, just the empty hose and line.

Q. Take the condition of the water as you know it to be in on the evening of March 17, 1921, do you think from your knowledge of the water that a man could live in the water very long if he should happen to fall overboard or get out of the boat with all of his clothing on?

A. Not very well. It is pretty cold.

Q. Do you think a man would live very long that was in there?

A. No.

Cross-examination.

(By Mr. RUPP.)

In order for a fisherman to fish he must have a clear bottom. Along in 1920 I was employed by a crew of fishermen or a combination of fishermen for the purpose of clearing up a certain space or drift. This drift started in about the lower end of the city of Kalama and extended about a mile and a half down the river. I don't know whether it was 450 feet wide or not. Among the fishermen who employed me for the purpose just stated was a man'

named Bartelson. I was employed in the [257] fall of 1920 by these men in clearing the river bottom over the space just mentioned. I was so employed in the fall of 1920 for about three months, but didn't work every day. I was not engaged clearing the river bottom between January 21st and March 17th, 1921, but I did work for this same crowd of men at this same point on this same drift after March, 17th, 1921. By the word "drift" I mean the space over which the fishermen are to fish and for which the bottom of the river must be cleared. In the fall of 1920 there was alongside of the drift on which I was working another drift belonging to another crowd of fishermen. drift was towards the Oregon side of the river and above the drift on which I was working. This second drift started in about one mile and a half above the town and extended out from the other side of the channel to the sand bar. The main channel of the river in March, 1921, was between the sand island which is located in front of Kalama and the Washington shore. The main channel of the river at one time was on the Oregon side of the river, but it was changed to the Washington side about two years ago. The United States government had for about two years previous to March, 1921, been dredging a channel in the river along the Washington shore. This channel the government dredges every year.

In clearing the river bottom for the fishermen the course pursued is as follows: The fisherman takes

an old net and drops it on the bottom of the river and with his boats pulls this net along, and when it strikes something that detains the net or holds it you go down and pick up the article which has caught or held the net. The vast majority of the articles which I pick up on the bottom and which hold the net are stumps and trees. I had in the fall of 1920 pretty well [258] cleared the bottom of the river on the drift on which I was working.

- Q. Now where with reference to the drift on which you were working, was this clay bottom that you have talked about in answer to Mr. Imus' questions?

 A. On which?
- Q. Where was there any clay bottom of any particular size on any portion of the drift which you were clearing in the fall of 1920?
 - A. Above this drift.
- Q. Above this drift. Now the boat as it proceeds from Goble to Kalama crosses the river further down the stream than this sand island which is in front of Kalama; isnt that the fact? A. Yes.
- Q.—and then comes up on the Washington side of the river in the main channel to Kalama. Where with reference to the place where the boat crosses the river was this clay bottom that you have talked about?
- A. Well, the boat swings over in across the channel and passes up on this side of the channel usually over that one head of this drift.
- Q. Had you done any work for the crew of fishermen which owned the drift just beyond the drift

(Testimony of Chris Hansen.)
on which you were working in the fall of 1920?

- A. Beyond the drift?
- Q. Well, you and I agreed a minute ago that there was a drift belonging to another crowd of fishermen alongside the drift belonging to the crowd of fishermen of which Bartelson was a party; we agreed to that, didn't we? [259]
 - A. Yes, sir, above it.
- Q. Now, had you done any work on that drift for the crowd of fishermen which owned that fishing ground or drift?
- A. I have, but I don't know certain what time it was.
- Q. Now, in order for the fishermen to fish it is necessary that the bottom of that river on the place where they are to fish be practically as smooth as this floor isn't that right?
 - A. Yes; that is for snags.

The boy I found who was holding on to a limb was in the Cowlitz River at the shingle mill right at the mouth of the river. In the mouth of the Cowlitz River there is a boom maintained by the logging company and underneath of that boom and in the immediate vicinity of it in the Cowlitz River there are a large number of snags. That is where I found the boy, but I didn't find him under the boom. I was looking for the boy because his mother sent me to look for him.

I can swim, but it all depends on what kind of water you put me in. I have gone swimming in the Columbia River at a certain time of the year. I

have been engaged in this diving business the most of my life.

I plead guilty to a charge in the Federal Court of Oregon for having had liquor unlawfully in my possession. [260]

Testimony of G. H. Thayer, for Plaintiff.

G. H. THAYER, being first duly sworn, testified on behalf of the plaintiff as follows:
(By Mr. IMUS.)

I live at Kalama. I am employed in the County Auditor's office at the present time. I have been county treasurer and county auditor of Cowlitz County. I have lived in Cowlitz County about fifty years. I think I am familiar with the Columbia River. I have been on that river practically all the time in the last thirty or forty years steamboating and gas boating most of the time. I remember of a number of instances of persons who were drowned and never were recovered to my knowledge. I have worked for Captain Reid on the "Queen" and the "Elf." I worked a good portion of the time up until the last year ever since Captain Reid has been there, probably ten or eleven years. I acted as pilot of the boat. It is the custom in handling the "Queen" to land on the outside of the "Elf" at the last trip at night, put out a spring line and hold it there until passengers are off and then drop the boat back in the moorings. This spring line is just one line. The bow of the boat will ordinarily swing out unless you keep the boat

(Testimony of G. H. Thayer.)

working ahead slowly and hold the wheel over so as to hold the boat in, which is the custom. That is the way I always did; kept the engine working so as to hold the bow up against the "Elf." I heard Mr. Pomeroy's evidence as to his position on the evening of March 17, 1921, at the time Stewart was missing. To a person standing in the position testified to by Mr. Pomeroy, I do not think a man could get from the "Queen" to the "Elf" without being seen.

(No cross-examination.) [261]

There was then offered a letter written by Mr. Sardam dated April 9, 1921, to Mr. W. A. M. Smith, Manager of the Mutual Life Insurance Company, Stuart Building, and an affidavit of Maude E. Stewart which accompanied said letter. The admission of these papers was objected to upon the ground that they were irrelevant and immaterial in that they did not furnish satisfactory proof of death. The objection was overruled, an exception taken and allowed. The papers were then admitted in evidence and marked Plaintiff's Exhibit 18.

There was then offered in evidence on behalf of the plaintiff a letter written March 23, 1921, by Mr. Sardam to the Mutual Life Insurance Company on behalf of Maude E. Stewart the beneficiary under policies Nos. 2242058 and 2244868. Counsel for the defendant Mutual Life Insurance Company objected to the admission of this letter on the ground that it was immaterial, irrelevant and not tending to establish any issue in this case, and (Testimony of Frank J. Sardam.)

furnishing no proof whatever of the death. The objection was overruled and an exception taken and allowed. The letter was then admitted in evidence and marked Plaintiff's Exhibit 19.

Testimony of Frank J. Sardam, for Plaintiff (Recalled).

FRANK J. SARDAM, being recalled, testified on behalf of the plaintiff as follows:
(By Mr. LANGHORNE.)

I received the letter shown me dated April 26, 1921, from the Prudential Insurance Company of America. That letter was an answer to one of the letters I had written them. [262]

Counsel for the defendant Mutual Life Insurance Company objected to the introduction of the evidence of the letter on the ground that said letter was not in any way binding upon the Mutual Life Insurance Company; and counsel for the Prudential Insurance Company of America objected to the letter on the ground that the same was irrelevant and immaterial. The objections were overruled an exception taken and allowed, and the letter admitted in evidence and marked Plaintiff's Exhibit 20.

There was then offered in evidence on behalf of the original affidavit of Maude E. Stewart under policy No. 2242058. Counsel for defendant Mutual Life Insurance Company objected on the ground that the same was irrelevant and immaterial in that said affidavit did not furnish satisfactory proof of death of Fred L. Stewart. The objection was overruled and an exception taken and allowed, and the paper taken in evidence and marked Plaintiff's Exhibit 21.

There was then offered in evidence the original affidavit of Maude E. Stewart, plaintiff in the above-entitled action, under policy No. 2244868. This affidavit was objected to on the grounds that it was irrelevant and immaterial and did not furnish satisfactory proof of death. The objection was overruled and an exception taken and allowed, and the paper admitted in evidence and marked Plaintiff's Exhibit 22.

There was then offered in evidence the original affidavit of Paul G. Shotswell in the Mutual Life Insurance Company case. Counsel for the Mutual Life Insurance Company [263] objected to the introduction of the same in evidence on the ground that the same was irrelevant and immaterial and that it did not furnish satisfactory proof of death. Objection was overruled, an exception taken and allowed and the paper admitted in evidence and marked Plaintiff's Exhibit 23.

There was then offered in evidence on behalf of the plaintiff an original letter written by Messrs. Hayden, Langhorne & Metzger transmitting the affidavit of Paul G. Shotswell. Objection to this letter was made by counsel for defendant Mutual Life Insurance Company upon the ground that the same was irrelevant and immaterial and did not furnish satisfactory proof of death. The objection was overruled and an exception taken and allowed, and the paper was admitted in evidence and marked Plaintiff's Exhibit 24.

It was then admitted by counsel for the Mutual Life Insurance Company that the company never requested any other or further affidavits of Maude E. Stewart and Paul G. Shotswell.

There was then offered in evidence on behalf of the plaintiff a letter written by H. G. Fitch on May 13th. Counsel for defendant Mutual Life Insurance Company objected on the ground that the same was irrelevant and immaterial and did not furnish satisfactory proof of death. The objection was overruled and an exception taken and allowed. The paper was then offered in evidence and marked Plaintiff's Exhibit 25.

There was then offered in evidence on behalf of the plaintiff a letter written by H. G. Fitch on May 13, 1921, to the Mutual Life Insurance Company. Counsel for the Mutual [264] Life Insurance Company objected on the ground that the same was immaterial and irrelevant and did not furnish satisfactory proof of death. The objection was overruled, an exception taken and allowed, and the paper was admitted in evidence and marked Plaintiff's Exhibit 26.

There was then offered in evidence, on behalf of the plaintiff, an original letter written by Frank J. Sardam dated March 23, 1921, to the Prudential Insurance Company of America on behalf of Maude E. Stewart. Counsel for the defendant Prudential Insurance Company objected to the introduction of said letter in evidence on the ground that it was immaterial, incompetent and irrelevant and furnished no evidence of proof of death. The objection was overruled, an exception was taken and allowed and the paper admitted in evidence and marked Plaintiff's Exhibit 27.

There was then offered in evidence, on behalf of the plaintiff, original letter dated April 18th written by Frank J. Sardam to the Prudential Insurance Company, also certificates of proof of death signed by Maude E. Stewart. Counsel for defendant Prudential Insurance Company objected to the introduction in evidence of said documents for the reason that they were incompetent, irrelevant and immaterial and not tending to furnish any proof of death. The objection was overruled, an exception was taken and allowed and the papers admitted in evidence and marked Plaintiff's Exhibit 28.

There was then offered in evidence three original affidavits signed by Maude E. Stewart and an original letter dated May 3, 1921, signed by H. G. Fitch enclosing the said [265] affidavits. Counsel for defendant Prudential Insurance Company objected to the introduction in evidence of these instruments upon the ground that the same, and each of them, were incompetent, irrelevant and immaterial and not tending to furnish any proof of death. The objection was overruled by the court, an exception taken and allowed and the papers taken in evidence and marked Plaintiff's Exhibit 29.

There was then offered in evidence on behalf of

the plaintiff original affidavit of Paul G. Shotswell under date of July 13, 1921; also a letter of Messrs. Hayden, Langhorne & Metzger counsel for plaintiff. Counsel for defendant Prudential Insurance Company objected to the introduction in evidence of these documents and each of them upon the ground that the same were incompetent, irrelevant and immaterial and not tending to furnish any proof of death. The objection was overruled by the court, an exception taken and allowed, and the papers admitted in evidence and marked Plaintiff's Exhibit 30.

There was then offered in evidence on behalf of the plaintiff an original letter dated July 14th written by Messrs. Hayden, Langhorne & Metzger to the attorneys for the Prudential Insurance Company. Counsel for the defendant, Prudential Insurance Company, objected to the introduction in evidence of this letter, his objection was overruled and the paper referred to admitted in evidence and marked Plaintiff's Exhibit #31.

It was then stipulated by and between counsel for plaintiff and counsel for defendant, Mutual Life Insurance [266] Company, that the first claims signed by Maude E. Stewart and the letter written by Frank J. Sardam and sent to Manager W. A. M. Smith in Seattle, were forwarded by said Smith to the Home Office in New York City. (Mr. LANGHORNE.)

Q. Mr. Sardam, in the letter that was offered and received in evidence this morning and written

(Testimony of Frank J. Sardam.)

by Mr. Stewart to his wife under date of March 18th, he spoke about \$86,000 life insurance. Is it not a fact that one of those policies amounting to \$25,000 had not yet reached the point where it was incontestable? A. It was not yet a year old.

Q. It was not yet a year old and no action of course has been instituted on any of those policies?

A. No, sir.

Cross-examination.

(By Mr. KEENAN.)

I don't think I can give off-hand a list of all the insurance policies, both life and accident, that were held by Mr. Stewart at the time of his disappearance. I can give you them approximately.

Mr. LANGHORNE.—I will furnish you a list of the policies and you may insert them in the record. The amount and the beneficiary. There is a little insurance payable to the estate. Judge McKenny will have those. I may have those but I am not certain. The National Bank of Tacoma has one for \$5,000 which was payable to the [267] estate, and they hold it as collateral. Now I haven't got that.

Mr. RUPP.—The administrator has one of the Bankers Life for \$6,000. The policies involved here amount to how much?

Mr. LANGHORNE.—Just in this case \$45,000. Mr. RUPP.—\$45,000 plus \$25,000, plus \$5,000, plus \$6,000 make \$86,000.

(Testimony of Frank J. Sardam.) Cross-examination.

(By Mr. RUPP.)

I don't know definitely how many accident policies were held by Mr. Stewart at the time of his disappearance. I could find out. I don't know positively the amount.

It was then agreed between counsel that a list of accident policies should be compiled and supplied for the record.

Plaintiff rests.

Whereupon an opening statement was made by Mr. Otto B. Rupp of counsel for the defendants.

Mr. LANGHORNE.—If the Court please, if it were a jury trying this case I think we would at least have the right to ask that the jury view the premises. Now I hope that counsel will join in asking the Court, if at the conclusion of this trial he has got any doubt about positions, distances and locations down there, [268] that the Court sometime when he is passing through Kalama view that slip and those two boats, and if the Court will let counsel on both sides know we will have the boats arranged there in the same position as they were on that night as near as humanly possible so to do.

Mr. RUPP.—Well, I would certainly be perfectly willing so far as I am concerned for the Court to receive any light that it can upon this case. I will be perfectly willing and I now agree that he may go to Kalama and that he may see these boats. There may be some conflict in the

(Testimony of Orville Makinster.)

testimony as to how they were placed. That might involve some difficulty, but I think it could be obviated. My position in the matter briefly is this: We wrote these policies. If this man is dead we are willing to pay them. If he is not dead we are not willing to pay them. And any light that this Court can get from a physical examination of that site I am perfectly willing that the Court shall have. [269]

Testimony of Orville Makinster, for Defendants.

ORVILLE MAKINSTER, being first duly sworn, testified on behalf of the defendants as follows:

(By Mr. KEENAN.)

I am captain on a ferry-boat between Goble and Kalama, and was so engaged on March 17, 1921. The name of the boat is "Black Jack." I saw and talked to Fred Stewart the banker at Kelso at Goble on the night of March 17, 1921. It was right close to eight o'clock. I could not tell the minute, but it was close to that time. It was dark, as dark practically as it would be at nine o'clock. I asked him if he was going to cross the river and he said "Yes," if he wanted me to take a car over. I said, "I have a boat right here if you are ready to go," and he said he was, he was not going to take the car over, and he came over in a car and he said he was in no hurry, so he asked me then where the telephone office was and I told him right there by the pool-hall. He said he was going to (Testimony of Orville Makinster.)

call up the Missis then, which he did I guess; he went in there and I didn't pay any more attention to him. I didn't return any more that night to Kalama because there was nothing to go over for. I stayed there that night. I asked Stewart if he was going over there and he said "No," so I remained at Goble.

(No cross-examination.) [270]

Testimony of Wilton Minckley, for Defendants.

WILTON MINCKLEY, being first duly sworn, testified on behalf of the defendants as follows:
(By Mr. RUPP.)

I live at Kalama, Washington, where I have lived for two years. I am a restaurant-keeper. On March 17, 1921, I was on duty in my restaurant in the evening. I went on duty about 5:30 in the morning. I don't think that I heard the whistle which announced the arrival of the ferry-boat at the slip on that evening. I saw on the evening of March 17, 1921, somewhere between nine and ten o'clock an automobile proceeding along the main street of Kalama up from the ferry-slip. I was sitting at the end of my counter, the back end, eating something; I don't remember what. It was an hour when there was nothing doing in the restaurant. It was approximately 9:30. The machine went by, going at the rate of probably twenty miles an hour. I don't know what kind of a machine it was or what size; a dark-colored machine, probably a black one.

(Testimony of Wilton Minckley.) Cross-examination.

(By Mr. IMUS.)

- Q. Mr. Minckley, your restaurant is on Fir Street? If this represents Reid's dock where the "Queen" landed that night, this is Fir Street, your restaurant is in this block, but a little lower down than shown here in the map facing this way; that is Fir Street; this is River Street?
 - A. This is the alley. [271]
 - Q. This is the vacant property?
- A. The vacant property. The restaurant is 24 —34—it starts in about 34 feet.
 - Q. From this alley?
 - A. From this alley east.
 - Q. Facing this way?
 - A. Facing Fir Street on the north side.

The next street running through here is Fir Street, upon which is the Pacific Highway. The Pacific Highway runs straight through the town running north and south.

- Q. River Street is paved this far and is paved one block out this way? A. To the intersection.
- Q. Yes, sir. Then there is Elm Street comes one block down the same as this to the Pacific Highway, one block out here?
 - A. Yes, sir, and on up the hill.
- Q. Now this is vacant property and the railroad track on this side of the street and there is no business on this Elm Street excepting a laundry and that would be closed at that time of night, wouldn't it?

(Testimony of Wilton Minckley.)

- A. I think it would be; it ought to be, anyway.
- Q. But starting in at this alley this is solid business up through the next street and all through this block here for a block facing on to the Pacific High-way? A. Yes.
- Q. Do you think that a man that was attempting to slip out of town would go down through this business part of town when he could get out through vacant property and hit the highway up the hill without passing any business houses? [272]

A. I would not.

Testimony of J. D. Chisholm, for Defendants.

J. D. CHISHOLM, being duly sworn, testified on behalf of the defendants as follows:

(By Mr. KEENAN.)

I am thirty-nine years of age. I have lived in Kalama about eight years. I came across on the "Queen" on the night of March 17, 1921, arriving somewhere about nine thirty. I went aboard the "Queen" at Goble. I remember when the boat docked at Kalama. I remember she docked outside the "Elf." I think I was the first passenger off the "Queen" that night. The next passenger was a traveling man who got off right close with me. The traveling man and myself went up the slip almost together. I see on the plat shown me the part indicated "River Street" and the spur track of the railroad and the black strip marked "Depot and Dock" and this black mark projecting out is the slip I have in mind. I think the traveling

man and I came up the slip right close together; there was someone behind us, I don't know exactly, but approximately ten feet.

- Q. Now assuming that this black strip marked "Incline" is the slip you came up and the blue strip here marked "Platform" and "Boardwalk" is the walk that goes either way from that incline, indicate to the Court what way you and the traveling man came up, which way you turned and which way the traveling man turned and when you turned? [273]
- A. I turned right this way to go this way and along this walk.
 - Q. Which direction did you turn and go?
 - A. Right this way, right over this way.
 - Q. Which direction is that. A. That is south.
- Q. Now which directon did the traveling man go when you got there?
- A. The traveling man turned towards the depot in this direction.
- Q. What direction did the man who was following you—how far did he follow you? Indicate with the ruler how far he followed you.
- A. I thought he followed me a little ways on this walk.
 - Q. And then what did he do?
- A. I paid no attention to him until I turned over on the corner turning this way. I looked over my shoulder then to see what had become of him and I seen a man crossing the tracks in that direction.

- Q. In that direction. Now describe that man; what was his height?
 - A. Well, I couldn't tell his height exactly.
- Q. In comparison with your own height what would you say?
- A. He was a man of ordinary height, probably as tall as I was.
 - Q. What kind of a coat did he have.

A. I couldn't say. I couldn't say whether it was a long coat. I didn't pay much attention to it. When I saw him turn to go across the railroad track he seemed to be in a hurry. [274]

I saw Fred Stewart on the boat that night. I should judge that the man I saw go across the track would be a man of about the same height as Stewart. I could not say how he was dressed on the boat that night. Stewart wore an overcoat: I noticed that. That is all I saw and I thought that the man whom I saw had an overcoat on.

Cross-examination.

(By Mr. LANGHORNE.)

I remember a conversation I had with Senator Imus and you in Senator Imus' office last summer. I do not exactly recollect what I told Senator Imus at that time in answer to the questions he asked me. I told Senator Imus I was the first man off the boat. I don't think that I told him that I went right up the slip and never paid any attention to anyone else. I told him that I went up the slip and turned away in a hurry; don't think that (Testimony of J. D. Chisholm.)
I told him that I didn't notice who else got off
the boat that night.

Q. Will you swear that you did not?

A. I couldn't swear to it because I couldn't be sure I did not tell him that. I expect I would remember if I said anything like that to Senator Imus at the time in question. I think I told Senator Imus that the traveling man and I went up together. I don't know whether I told Senator Imus that I was in a hurry to get home and didn't pay any attention to anyone else, but those are the facts. If I did tell him that it was the truth. I don't know that I told Senator Imus that I didn't see anyone [275] else and didn't pay any attention to anyone else. I remember he questioned me about what took place when I came over on the boat. I don't know whether I told Senator Imus that Fred Stewart stood on the bow of the boat. I could describe Stewart's position on the boat. After we got out about the middle of the river I was standing out on the bow of the boat in front of the pilot-house when Stewart came up from some position back of me and crossed over to the bow of the boat as if to cross the boat, went past me hurriedly and quickly turned around and jumped over some baggage by the pilot-house and crossed over to the other side of the boat. That was the last time I ever saw Fred Stewart.

Q. Now which way did this person go after you got up the street, which direction?

A. I didn't look; I didn't notice which way he went.

I don't know who he was and I don't pretend to say who he was. So far as I know he might have been someone who didn't get off the boat. I don't say who he was only that I saw a man crossing there.

Q. You didn't tell us that when we talked to vou in Senator Imus' office last summer, did you?

A. I don't think you asked me. I had no reason for concealing it. I remember a conversation last week in Senator Imus' office. Prior to coming to his office that day I had been working. I had been with several people; had been around on business. I had been out with Mr. Keenan who represents insurance company. We [276] went to Woodland. I drove him down in my car. I am not engaged in the automobile business. When I came back Senator Imus asked me to come to his office. I think I remember what I told you there. Mr. Imus asked me some questions; asked me if I had interviewed an insurance man that morning and I told him I had. As to any conversation which had taken place, I told you if you had subpoenaed me I would tell you on the witness-stand. I don't know whether I ever told anyone until I told Mr. Keenan about this man who followed me up the slip. I believe, however, that Captain Reid and I talked about the fact that some man followed the traveling man and myself and that this other man turned and went in the direction in which I

say he did. I could not say when I first talked to Captain Reid about it, but it was approximately two or three months ago. I knew that the matter of Stewart's disappearance had been talked about in Kalama and Kelso and all Cowlitz County for months. I knew that insurance agents had been down there and Mr. Fitch had been down there seeking the light. I presume the first man I told it to was Captain Reid.

Redirect Examination.

(By Mr. KEENAN.)

I believe that Mr. Langhorne was in Kalama the day that you, Mr. Keenan, were there. I don't remember that either Mr. Langhorne or Senator Imus ever asked me at any time or place about a man following me up the slip and turning out into the street. I was in Mr. Imus' office one day last summer. That is the time Mr. Langhorne refers to. Mr. [277] Langhorne was there. I have not talked about this case. I don't talk about anything very much with anybody. I don't know of any particular reason, except that I usually try to mind my own business and keep out of anything that does not concern me. So far as I remember I don't think anybody ever interviewed me as to that man who followed me up the incline. either Captain Reid or at the time I talked with you. I saw the three cruisers on the boat. I think one of them stood right on the bow of the boat where I was. I can't say if he was there all the

time. He was standing there with me and the others, I think, were in the cabin probably before I got on the boat. I noticed the one cruiser standing close to me. I didn't see anything of the other cruisers after we landed. I didn't pay any attention to anyone. I presume that I went up the incline ahead of the cruisers because I was first off the boat. I didn't hear any alarm given about Stewart's being lost.

Recross-examination

(By Mr. LANGHORNE.)

I heard Captain Reid say nothing at that time. I saw him standing there at the slip, at the time I passed him. I heard no call to him and I didn't hear him say anything. [278]

Testimony of John Reid, for Defendants.

JOHN REID, being first duly sworn, testified on behalf of the defendants as follows:

(By Mr. KEENAN.)

I am the owner of the ferry-boat "Queen." I own and operate the boat "Elf."

- Q. And is this a fair representation of the depot platform and your slip and the public dock?
 - A. Well, there is just one public dock there.
 - Q. Explain the situation there for the Judge.
 - A. This here dock is the foot of Fir Street here.
 - Q. You are referring to the two red projecting—
- A. Yes, the one that extends the furtherest south. That belongs to the City of Kalama. This other dock here I have got a lease from the Northern Pacific Railway Company over their right of way.

Mr. KEENAN.—I will mark the first one you referred to as "A" and the one you are talking about now as "B."

A. (Continuing.) Yes. That is the one I built for myself; had it built rather; and I hold a lease from this dock to this one here on the right of way from the Northern Pacific Railway Company, but the docks are built on state land here.

Q. Now point out to the Court the slip that was used the night the passengers came off the "Queen."

A. The dark slip is the one that was used.

Mr. KEENAN.—We will mark that "C."

The incline from the top to the bottom is 130 feet. It is [279] about fourteen feet from the north end of the slip to the south end of the depot. The direction which the passengers take to come up the incline marked "C" and go up Main Street into the town, go south on the ten foot platform right along this walk here. I remember the occasion of my going down to the dock on the night of March 17, 1921. I left home about a quarter to nine and came down town for the purpose of going to Lodge,—the K. of P. Lodge that evening had a smoker. I went to lodge but didn't know the pass-word; I didn't get in and went down to the boat. The K. of P. Hall is on the Pacific Highway.

Q. Point to the map where it is.

A. The K. of P. Hall is supposed to be down about here. I think some place on the main street.

Q. Assuming there was a street here?

A. This is Fir Street here, so this would be the street south of there.

Q. This is a block, assuming the street was here?

A. This would be—we will assume this is the street here, that is the sidewalk on the side here, the K. of P. hall was on the extreme end of that block, in the building, one vacant lot there.

Q. What course did you take to get to your dock?

A. I crossed the street and went over to this street, went over this corner here and I come up along this vacant lot. There was a scow in here and a moving-picture show over on the other side and a little grocery-store on the corner and there was a little scow house in here and the rest of the block, half a block, vacant up through here. [280]

Q. Is that the way you went?

A. That is the way I went.

Q. Then where did you go from there; to the dock?

A. Right across this street crossing over the railroad track to the depot, the depot about right in here.

Q. Did you see a standing automobile any place when you went from the K. of P. hall to the dock that night? A. Yes, I did.

Q. Where was it?

A. It was standing about here. There was some billboards in here. The billboards was in here. That is it. It was about the middle of the billboards. There was one car standing there heading towards the highway.

Q. Mark that with an "X."

A. Yes, about there. The curtains were all closed on this machine. There was no light on it whatever. There are no buildings on this side of the block where the billboards were. As I turned to the right there were no buildings. This is a half vacant block right here; nothing on it at all. I was standing at the slip on the night when the "Queen" arrived. My purpose in going there was that I came down there occasionally to check up the passengers. In checking up I mean the number that come off, and that night according to my count six passengers came up. I can give a description of the passengers who came up. There was two men who came up together. One was rather tall and the other was a stocky man, and about ten feet behind the first one rather a tall man; he wore an overcoat. When the first two men got up at the top of the slip one went [281] south on the slip and one went to the depot. One went to the right and one to the left. When the third man came up he turned to the right and followed the first man. He was about ten feet behind the first man when he turned. He made another turn before he got to the crossing. He followed the first man probably 75 feet or 100 feet before he made the second turn. He then turned directly across the railroad tracks.

Q. Where was that direction in comparison with the automobile that was standing?

A. The automobile was standing directly left, to the north of that when he crossed there. As I have

it in my mind the first two men came up together, one right close to the other, and one of them turned off from the slip to the south and come right up along this sidewalk here. The other man turned into the depot. That would be the south here. This thing is all wrong here the way it stands looking to the street. And the other man turned into the depot. The third man came up, as I say, about ten feet behind them and he turned south the same as the first man until he got along, I would say, probably this here block of street. This sidewalk of mine along here is 16 feet on the right of way, and he crossed the railroad track before he got to my 16 feet and went directly across the railroad track.

Q. Point out now where he went?

A. Well, right here is the railroad track right over here.

Q. Point down the way he went.

A. Right over here on to this main street here. That is [282] River Street right there. And after he got on that River Street, as far as I could understand from my eye—It was dark in there. There was a light here though some—there was a light in here. Let me see. Where was that light? There was a light here some place. It seemed that the man come walking north down this way—that is it—walking down this way. There is a couple small houses in here, tool-houses and a little oil-room and there is two shacks this side of that pathway into the railroad and there is one to the south

of it and he got here to the one to the south and about the time he got here he lost my sight, I didn't see any more of him and I didn't pay any attention to his goings after that.

Q. Point out to the court where the lights were at the dock there that night?

A. The lights of the dock. There is one light at the top of the slip.

Q. It is marked there?

A. Is it marked there? I will get my glasses. (Witness puts on glasses.) Oh, yes, that is on a pole about 16 feet high, that light is. That is supposed to be a hundred candle power light, but that night it was out. We had no light in there that night.

Mr. LANGHORNE.—Where was that you had no light?

The WITNESS.—On this pole on top of the slip, on the south side of the slip, the light was burned out.

Q. Where was the other light?

A. The other light—now this here slip it is changed since this light went in here. This light here was up on the middle of the slip about 60 feet from the boat [283] landing on a 12 foot pole standing up. Now it is down on the slip hanging from the top of the slip, because we had high water last year and the old house was pulled down and it made the change in the light. So this light was on the slip, but this one was out, this top light was out,

so it made it pretty dark right here at the head of the slip.

Q. Down the dock as you come up the slip where is the light?

A. Right there it is. That is the street crossing. I knew Fred Stewart the banker slightly. I was somewhat familiar with his size and height. The third man I have testified about to my observation looked about the same size as Stewart. He wore an overcoat and a slouch hat. At the time the boat arrived, the weather was bad, raining and blowing. The wind was from the southeast and was practically on their back coming up and when they turned to go to the south the wind was in their face.

I have lived at Kalama thirteen years on March 6, 1922. I have been on the Columbia River, with the exception of one year, since February 7, 1886. During the entire time that I have lived on the Columbia River I have been employed on the waters of that river.

There are very few persons who have been drowned in the Columbia River whose bodies have not been found. I do not recall any person who was drowned in the waters of the Columbia River in the vicinity of Kalama whose body has not been found. I searched the river for Stewart's body for seventeen days. I would say that close to 25 other people endeavored to find his body. These 25 other people had boats and tackle of their own. I didn't make any effort to find the body on the night [284] he was reported drowned. I remember about some

notice of reward for the recovery of the body being posted. I don't remember the initials of the name which was signed to that notice, but the name was Sardam. Mr. Sardam is the man who testified in this trial vesterday. During the seventeen days that I was exploring the river to recover the body, no one came from Kelso to make inquiry of me as to what progress I was making. Mrs. Stewart never made any inquiry of me as to what progress I was making to recover the body. Carl Haves brought me a grappling iron at one time. He and I made an early morning search on March 18th. He and I arranged to go out early in the morning just as soon as daylight came. I had the boat in readiness and he came down. I don't know how he got there; a car probably. It don't make any difference, he was there. And he started over on to the Northern Pacific Dock just clear of the landing of the boat and I took the beach underneath the docks until we came to the Barr shingle mill and then we had to go up and go around the shingle mill until we got to the west of it and go down on the beach again because there was rubbish there, and I went down along the beach as far as it was safe to travel on account of wreckage and drift and rotten timber and I had my man and boat laying to the boom outside going along the drift wood along by the Standard Oil Company until this far down and then he came and picked me up at the Standard Oil Company dock; that dock was about six or seven hundred feet from my slip.

Then we went on the boat until we got on the lower end of the old transfer slip and we took to the beach again, Mr. Hayes and myself, and we went down from there, from the Kelso mill to the lower end of the Mountain Timber Company's slip and then we took the boat again and as the current sets from there to [285] the Oregon shore we decided we would go over what we call the Coffin Rock eddy and anything that floats in the water will—does not cross the river by the current setting that way and we didn't discover anything there. So we went into the Trojan Powder Company's slip which is around the point and looked closely around in there and nothing was discovered. And then we dropped down to an old wharf that had been built by a powder company on the Oregon side and there was a fisherman living there, a scow, and we got over his float on to the beach and we examined all the driftwood and all the surroundings there and cautioned him to look out for the body or anything belonging to it. We got nothing there. So we decided that we would go down to Cottonwood Island and Cottonwood Island is the refuse place for anything that drifts on the Columbia River. Anything that is adrift that don't get on the shore it is going to get on Cottonwood Island. We felt sure we would find some trace, either a hat, coat, or this bag he was supposed to have had. Mr. Hayes and myself went around the island, he going one side and I went the other, and we walked down there amongst the driftwood—I did. I don't know what he did

on the other side because it is about half a mile across there. But I did, and took a long pole which I poked through the driftwood as I could see it on the beach, and I went as far as I could until I got nothing, a dangerous place on the west end of the island where there was some old trestle work and old jetties and couldn't go any further on account of the water, so we met two-thirds of the way down the island and we gave up the chase. Now on the way back Mr. Hayes and myself had some conversation about Mr. Stewart. Mr. Hayes says to me, he says, "I don't believe that bugger is in the river." So I didn't make any further reply to his question [286] and—I got a little ahead of my story. We were brought ashore in the skiff from my launch. We tied the skiff—the boat up to a piling out in the river and came ashore with a skiff and then we came back and went aboard the boat and we hunted the shore on the Washington side until we got to Kalama again and thought we might pick something up on the way up, but we didn't discover nothing. So I landed Mr. Hayes in Kalama and he went home and I told him I would continue the search, which I did. I dressed up the boat, rigged up sturgeon hooks, lines and hired a man to go out on the boat to patrol with me. We took watch and watch about. He would go out for an hour or two and I would go out and relieve him and we done that zigzag over this supposed course Fred Stewart had disappeared on the boat, and then we took the inshore side of the boat afterward. We covered the

course of the boat as near as I could figure it out myself. I would go probably a thousand feet each way across the river covering the course in a zigzag way. I would head south or southwest and then come in again southeast and then zigzag up and down. If there was anything there I was going to find it. I found little snags there once in a while. It didn't hurt the hooks any. I lost a hook once in a while. We continued the search down the river from that point, then we got a larger skiff, about seven foot long, from Portland and I put a slip line on so if the hooks caught anything very heavy on the bottom it would only break off a hook at a time, and I dragged from where the boat landed down to the lower end of the Mountain Timber Company slip continuously. That is about a mile and a quarter. The other searchers searched the river further down than that. There were some of them drifted as far as Coffin Rock. [287] That is about two and a quarter or two and a half miles. The channel of the river is on the Washington side. surface of the ground on the bottom of the river is perfectly clear. The Government has made appropriations to my knowledge for the Columbia River for the last thirty years, hundreds of thousands of dollars each year. Part of the improvements made by the government is in the vicinity of Kalama. have two large dredgers, one is called the "Multnomah." These dredgers work in the low water entirely. All the time pretty near.

We have, I should say, the largest commerce of the deep-water vessels, I guess, on the Pacific Coast coming to Portland at the present time, from 500 tons to ten and fifteen thousand ton ships, up and down that river. There is all kinds of craft, boats, and small passenger boats that run there all day not all day, but there is a couple in the morning and one every night. Lights are maintained by the government on the shores of the Columbia River. They go by the channels and the turns in the river. They are maintained by the people that lives closest to the light. The government pays them so much a month for taking care of the light in that vicinity. As a rule one person takes care of more than one light. If a man is around there and there is a few lights close by him he might have seven or eight. He gets from lamp to lamp by using a fish boat with a gas engine in it. It is a fact that you find these little boats plying up and down the Columbia River all day long. Every place you look you find a boat. The lights are seven day lights, but they generally look them over; but that is not the only boats that travel. There are all kinds of boats traveling on the Columbia River. There is a passenger boat leaves [288] Portland every morning and one every night, and there is a boat leaves for Clatskanie, it leaves every night from Portlandevery other night-it goes down one night and up the next; then there is a boat that runs to Kelso every second day. We have got a boat from Kalama every morning to Portland and return; and

then there is all the traffic of steam schooners and lumber boats all day long. In the summer-time the fishing boats are very thick and they lay at Ladu waiting to lay out their nets and sometimes you will see seven or eight of them waiting for a chance to get laid out. If a large boat is coming up the river and it is loaded or even not loaded, if it gets into shallow water it will draw the water up from the bottom and if there is anything in the bottom it is going to make a move; there is always a suction to the propeller of a big boat that draws the water up.

- Q. And that has a tendency to loosen and draw anything up that is on the bottom?
- A. Yes, that will loosen or pull away from the shore or anything on the bottom.

The river on the 17th of March, 1921, was seven and one-half feet above normal. The current was running about two miles an hour. The Columbia at that point is not usually swift. Take it last year when the water was up to the highest we have had it for twenty-five years, the current didn't run much over three and one-half miles an hour. That part of the river is affected by the tides from the sea on low water. When the water is down we will say within four feet of zero we will get a back-up from two and a half to three and one-half feet, according to the tide, whether it is [289] a full moon tide or mid-tide. There is a big tide one part of the day and the other is a small one. The tide will back up as far as Portland and raise some six

to eight inches. The current will run up the river as far as Kalama on low water on the spring tide; when that tide is backing up the river it affects the water clear to the bottom of the river.

- Q. And what would the tendency be, if there was a body in the bottom of the river that was caught on a snag or some obstruction as the current went down, as to releasing the body by the water backing up?
- A. It would not make any difference whether it was a body or what it was, if there was anything down on the bottom it would clear itself by the flood.
 - Q. Upwards? A. Yes, by the upwards flood.

There is a little dispute between the men on the boat as to who called me first concerning the disappearance of Stewart. I heard Mr. Pomeroy the first one. Mr. Shotswell says he called me, but I didn't hear him. At the time I heard the call from Mr. Pomeroy, the passengers were all off the slip and gone. Mr. Pomeroy said, "Jack, did you see Stewart come up?" I said, "No." He said, "He left his grip here." I didn't recognize anyone who came up the slip as Stewart. I didn't recognize the first man who came up, but I discovered from Mr. Shotswell that that gentleman was John Chisholm.

- Q. And is there any man in Kalama that you are any more acquainted with than John Chisholm? [290]
 - A. John Chisholm comes to my house and we play

cards together and I take a ride in his car and he crosses the river with me quite often and I carry his laundry across over to Goble and I carry a monthly account with him.

- Q. You see him many times every day?
- A. I see him dozens of times every day.
- Q. And yet when he came up that night you didn't see him?
 - A. I didn't speak to him and he didn't to me.
- Q. What was Stewart's habit any time he came up that slip?
- A. I don't know that I ever stood on the slip when he saw me, but if he saw me he always said, "Hello, Cap."
 - Q. His habit was to speak to you?
- A. He would just let me know he noticed me, that was all.
- Q. I am showing you Defendants' Exhibit "B." Is that a fair representation of the way the boats were tied up that night?
 - A. With the exception of one thing.
 - Q. Yes, explain.
 - A. The bow of the barge was close to the pontoon. COURT.—Close to what?

The WITNESS.—Close to the pontoon where that headline is on. It was hauled up snug close to, right here, right here, close in here.

- Q. But in relation to the "Queen" being tied up to the "Elf" is that a fair representation?
 - A. That is a fair representation, yes.
 - Q. Now, about how far is it from the fore end of

the cabin to the end of the bow of the boat?

- A. From the fore end of the "Queen"?
- Q. No, the fore end of the cabin of the "Queen" out to the bow? [291]

A. To the bow of the "Queen"?

The COURT.—Do you mean the cabin or the bow?

- Mr. KEENAN.—I was referring to the cabin first.
- Q. From the front of the cabin how far is it out to the— A. Cabin house door?
 - Q. Yes.
- A. It is seven feet from the forward part of the cabin to the door of the pilot-house.
 - Q. And there is an alleyway between—

A. And there is an alleyway between the rail and the engine-room. That other little place is the engine-room. There is close to two feet. I don't know just exactly, but it is close to two feet.

The engine-room is in the same superstructure as the pilot-house, but it is to the rear of the pilothouse. The pilot-house sticks over a portion of the engine-room on the inside. The engine-room extends into the pilot-house as that desk is on top there.

- Q. How much space have you in the engine-room?
 - A. We have—that is a little over nine feet.
- Q. There is room there for men to stand down in there?
 - A. There is room for men and the toilet.

- Q. The toilet is down there too? A. Yes.
- Q. As the pilot is going in to tie up is it possible for him to see back into the cabin, the passengers' cabin?

A. No. he couldn't at that time.

The COURT.—What is the length of the "Queen"?

The WITNESS.—The "Queen" is 58 feet over all. [292]

- Q. And what is the length of the "Queen" from the time it first touches the "Elf" up to the bow of the boat—into the bow of the boat; can you give an estimate—
 - A. I don't understand that question, Mr. Keenan.
- Q. Of course, the "Queen" touches the "Elf," A. Yes. doesn't it?
 - Q. At what we call the cleat, is it?
 - A. At the cleat.
- Q. How far is it from that cleat up to where passengers can stand towards the bow of the boat?
- A. Well, it is about 19 feet from the fore part of the pilot-house to the bow of the boat, the unloading platform. We have got chains on the "Queen" that we take down the chains and we let the passengers out through I would say six feet of an opening.
- Q. Now where is that opening in relation to the pilot house where the pilot stood?
- A. That opening—the pilot stands up in the pilothouse as high as that lamp and the opening is right in front of him.
 - Q. Now, how far would the fore end of the cabin

be from the point where the pilot would be standing as he steered his boat?

- A. I didn't get that question.
- Q. How far from this door entering into the passengers' cabin on the fore end is it to a point where the pilot was standing in the pilot-house?
 - A. Well, it was about seven feet.
- Q. There is a guard around the water line of the "Queen" isn't there?
- A. Yes, then there is a projection, what you call that [293] that is the guard—there is a guard in there with some nosing on the guard.
- Q. How far does that project from the side of the boat?
- A. The oak nosing is two inch; it is a piece of two inch dressed oak and there is about two and one-half inch of soft wood on the inside, so I would say it would make approximately between four and five inches.
 - Q. Clear of the outside surface of the boat?
 - A. Yes.
 - Q. And that is just above the water line, is it?
 - A. That is the first guard.
 - Q. And does that go clear around the boat?
 - A. That is all the way around right fore and aft.
- Q. The windows as indicated in your photograph were merely openings; there were no closed windows in there that night?
- A. No, I was made to take the windows out by the government. That is why I took them out.
 - Q. What was there in the openings?

- A. There was canvas.
- Q. How were the windows constructed on the outside as to a person being able to take hold with his hands? A. Oh, quite easy.
- Q. Would a person have any difficulty in taking hold? A. None whatever.
- Q. Now, how far is the first window from the rear deck—from the rear end of the cabin I will put it?
- A. This picture does not give the condition of the boat the night it stood there that the accident happened.
 - Q. Explain the cabin.
- A. This cabin has been rebuilt on the back end since that [294] time, on the aft end of the boat.
 - Q. Describe it as it was on March 17th?
 - A. On March 17th I would say it was two feet-
 - Q. From the—
- A. From the little cockpit on the back of the boat by getting on top of the rail to the first window.
- Q. How high is the railing there at that cockpit or rear platform?
- A. I think to be correct about it, I think it is about three feet four.
- Q. Now, could a person step over that railing and stand on that guard, four-inch guard, take hold of the windows and walk around to the fore end of the boat?
- A. He could step on seats on there and get over the railing and get onto this guard.
 - Q. And could be move himself clear forward?

- A. I have done it lots of times.
- Q. On the night of March 17th could a person have stepped over that railing, stepped out on the right hand side of the boat and moved forward and gotten in the passenger cabin in the front in one of those doors? A. He could.
- Q. Could he have done that while the boat was landing? A. Why, most decidedly he could.
- Q. Now could a person have gotten out on that guard from the rear platform and walked forward on the boat and then be out of view from anyone standing on the rear platform unless they leaned clear out several feet?
 - A. If he leaned on the outside of the boat?
 - Q. Yes, on the outside.
 - A. Yes, I could do it. [295]
- Q. And anyone standing on the rear platform wouldn't see you? A. Not a bit.
 - Q. That is on account of the bow of the boat?
- A. The boat is built on a line right at this part of the boat; she was a little cut away on the stern and on the bow; when the bow comes in you are out of sight; this cabin would hide you altogether. And the windows are away down low. He could come in that window. There is nothing to stop him coming in that window if he wanted to.
 - Q. Come in the window? A. Why, sure.
- Q. So on that night there was nothing to prevent Stewart or any other man from walking around that guard on the right hand side of the boat, coming in the window, getting in the pas-

senger cabin after the passengers went out, and then stepping on the railing and getting out of the passenger cabin on the "Elf" and coming up town?

Mr. LANGHORNE.—Have you got him there yet?

A. I want to explain that to you in my way.

Q. You may.

A. The rail on the "Elf" and the rail on the "Queen" for that seven feet is the same height—

Q. Yes.

A.—and if a man wanted to make his getaway on here why, he is out of sight of everybody by lowering his head a little.

Q. Explain to the Court just how he would do that.

A. Well, if he would get out of that door there. [296]

Q. What door do you refer to?

A. This door right here.

Q. In the cabin?

A. He could lower his head a little bit. The Judge has got one, hasn't he?

Q. Point it out.

The COURT.—I don't understand what you mean by "get out of the door here."

A. The door right in there you see comes out from the cabin, a little door there.

The COURT.—It is closed now?

A. You can't see the door. It is in the forward end of the cabin. This here door is seven

feet from this door and it is about ten feet from this window up to the pilot-house. A man could easily lower his head here and this here house is pretty near five feet high—it is over four anyway—and get his head down there and slip over that rail there. There is a rail right there on the "Queen" and there is a rail on the "Elf" and he could slip there and come over the rail.

The COURT.—How far is it between the walls of the two cabins in that position?

The WITNESS.—They are right close together.

The COURT.—How far?

The WITNESS.—With the cabin—with the boat being fast they would not be probably more than eight inches.

The COURT.—The walls of the cabins?

The WITNESS.—They are between the two rails.

The COURT.—Between the cabin walls of the two boats?

The WITNESS.—You mean this wall and this here?

The COURT.—Yes. [297]

The WITNESS.—This here—you mean this wall here and that one?

The COURT.—Yes, the space in there?

The WITNESS.—There is a space in there of two and one-half feet and an alleyway in here on the "Elf" and this cabin goes right up to the guard, so it would only be two feet and a half, the outside of the cabin, right up to the cabin on the "Queen."

(Whereupon Defendant's Exhibit "B," for identification was admitted in evidence and marked Defendant's Exhibit "B.")

On the night of March 17, I do not know the number of passengers that came aboard the boat at Goble. The timber cruisers left their baggage in the depot as they came up the slip. Exhibit "C" is a good picture of the ferry-boat "Queen." Since that picture was taken the house was rebuilt around the windows and the back portion of the boat. The difference between the boat as shown by this picture and as it was on that night is, the windows were not finished; on the starboard side all these windows they were cut down to the top of the seats and on the port side all the windows were about the same height, but not completed with carpenter work.

In the bow of the boat in front of the pilothouse there is room for two automobiles and three or four motorcycles. Exhibt "C" is received in evidence. [298]

Cross-examination.

I have lived in Kalama thirteen years. I lived in Astoria about eighteen years. I was in the shipping business. I have been operating the "Queen" across the Columbia River since May, 1909. I did not know Fred Stewart very well. I know that he lived in Kelso and was a banker. I have probably seen him crossing the river ten times. I think I saw him in Kalama once or twice in his life. I never met him in Kelso.

When the boat came in on the evening of the 17th of March I was standing at the head of the slip. I had come from the depot where I had been talking to the operator as it was a stormy night. When the boat came in she had her lights on. The light was also burning at the middle of the landing. I recognized Defendant's Exhibit "B." I helped them rig the boats there. It is a fair and accurate representation of the boats. When the boat drew up to the landing I had a full and fair view of it.

- Q. If there had been anybody hanging on to that little three-inch railing there would not have been anything on earth to prevent your seeing them would here? A. Yes, there would.
 - Q. What?
- A. You look over your picture and you will find out.
 - Q. You answer the question.
 - A. You couldn't see them.
 - Q. Why?
- A. Because they were hidden by the house on the "Elf."
 - Q. Give me that last picture I showed you.
 - A. Here they are. [299]
- Q. Let me have the one I handed you. Do you mean to say that the cabin on the "Elf" would have hidden anyone?
 - A. That will hide it from the top of the slip.
- Q. But anyone coming in hanging on there would be in full view of anybody that might be down there on the "Elf"?

A. Now, Mr. Langhorne, there was no lights on the bottom of that slip and I haven't got cat's eyes either.

Q. I say if anybody had come in on the "Queen" hanging on to that little three-inch strip, supporting themselves by their hands onto the windows, they would have been in plain sight of anybody that happened to be standing on the "Elf."

A. If they were standing on the "Elf"?

Q. Yes. A. Yes.

Now this boat is swung in purposely at the bow of the boat for the purpose of letting the passengers off when you are putting baggage off, but on a man making a landing coming up the river its bow is extended off from the other side from the landing of the boat forward. The boat comes in so shape and out of the center, the stern of the boat here. This door to the house swings in close to this rail and them two rails come directly together. A man opening that door can come out there and step from that door and throw his legs on to the top of the rails and he is on to the "Elf." When I heard Captain Pomeroy call that Mr. Stewart was missing I walked leisurely down the slip. Mr. Pomeroy and I went to the boat. He was on one side of the boat and I around the other on the inside only. I didn't make a good search because it didn't interest me very much. I didn't ask Pomerov and Shotswell how many passengers they took on to Goble. I [300] didn't have to.

Q. All right. An alarm had been sounded by

them that a man was missing and do you mean that you did not check up with them the number of passengers that got on at Goble? A. I did.

Q. When did you?

A. A couple of weeks afterwards I checked up my account.

Q. You waited a couple of weeks to find out of Pomeroy and Shotswell how many passengers they took on at Goble? A. I don't check them at all.

Q. Captain Reid, did you wait two weeks to find out of Shotswell and Pomeroy how many passengers they had taken on that boat?

A. They never told me and I never asked them. Probably ten minutes after the boat came in I telephoned Sheriff Hogett. I stated to Sheriff Hogett that Stewart was missing.

Q. When did you tell Shotswell and Pomeroy that you counted six passengers coming off of that boat. A. I never told Pomeroy.

Q. When did you tell Shotswell.

A. I told Shotswell probably a few days before this trial came up.

I kept that matter locked up in my own hard from March, 1921. The only one I told was my wife. I told her when she checked up the books. I never told Sheriff Hogett or William Stuart, prosecuting attorney of Cowlitz County that I counted six passengers coming off the boat. I know that Mr. Stuart, the prosecuting attorney of Cowlitz County never interviewed me in August of 1921 about how many [301] passengers came up the

slip off the boat. I never told Stuart, the prosecuting attorney, that Stewart could not possibly have gotten off the boat without my seeing him and that only five passengers got off and that all the talk about Stewart geting off the boat unobserved was bunk.

I know Lawrence Perry, formerly the county treasurer and county clerk of Cowlitz County. I did not tell him on the morning after Stewart's disappearance that he (Stewart) was in the river and that only the three loggers, Chisholm and the drummer came up the ship.

I had an interview with Mrs. Stewart about August 13, 1921, concerning the disappearance of her husband. I did not say to her, "My testimony will kill all these wild stories they are circulating about Fred Stewart's disappearance." Neither did I tell her that only the three timber cruisers, Chisholm and the drummer came up the slip. I did tell Mrs. Stewart that as a friend I would help her, provided there was nothing else come into my mind at that time to change it.

- Q. Well, what changed it.
- A. Well, there is lots of results changed it.
- Q. I want you to tell the Court.

A. I seen the poor people that had suffered in this case and lost their money and was destitute, and *my know* that those six men come off that boat, why should I shield this man if he was the sixth man. Why should I do it. Therefore I changed my mind, and Mrs. Reid told me, she

says, "Jack, you are a fool for to stand this thing, to spend your money and your time on this man's body when you know there was six men got off that boat," and that [302] is why I changed my mind.

Yes, I searched the river for seventeen days with my boat, hunting for Stewart's body. I did that to convince myself, to make sure that Mr. Stewart was not in the river. Yet I told nobody but Mrs. Reid.

Q. Why didn't you tell William Stuart, the prosecuting attorney.

A. I wouldn't tell him anything.

Q. Why didn't you tell Sheriff Hogett.

A. I wouldn't tell him anything.

Mrs. Stewart came again to see me in March of this year. I don't know what dates they were. She talked with me last week. We were alone at the time. She asked me why I was now telling that six men got off the boat. I don't remember what I told her. I was scared of her. I thought she had a gun. I told her there were six men got off the boat.

Q. Did she not then say to you, "Why did you tell me that only five men got off the boat when I interviewed you in August or September of last year.

A. I never told her there was five got off the boat.

I was averse to telling anybody that six men

got off the boat as I didn't want to have anything to do with this case

I know Edward D. White, formerly deputy sheriff. I did not tell him four or five days after the disappearance of Stewart that only the three loggers, Chisholm and the drummer got off the boat. 1 never told Grover Thornton the night of Stewart's disappearance that Stewart did not get off the boat. [303]

I know W. S. Carson. He was one of the fishermen that was out looking for Stewart's body. I showed him where it would be best to look for the body.

Q. And at that time you carried around in your breast the secret knowledge that six men got off A. I did. the boat?

I know Carl Hayes. He brought me some grappling hooks to use in searching for Stewart's body and I made use of them. The search that I made for the body probably cost me \$50.

I did not tell Carl Haves on the night of the 17th of March that only five men got off the boat.

I instructed Captain Pomerov to make a report to the government of the death of Stewart. [304]

Redirect Examination.

I have no idea of the number of times that different people asked me about this accident since it happened, probably hundreds of them. I never did, at any time, take pains to explain to any of those curious people just what I saw and what I heard on that occasion. I did not think it was

their business to know my business. I had a reason for not talking about this accident to everybody. I did not want to have anything to do with this case. I wanted to keep out of it. That was the only reason, that I wanted to be entirely out of the case and not in it. When there are only a few passengers on the boat, they are all ready to get off as soon as the boat stops. Mr. Imus, associate counsel for plaintiff spoke to me about making an affidavit.

Q. What did he say to you?

A. "Well, you know, it is the same old story again, Cap." They all call me 'Cap,' you know. He says, 'Cap, it would do me a great favor,' he says, 'if you would get you and your boys for to give me an affidavit that Stewart was lost off that boat.' 'Now,' I says, 'Mr. Imus, the other boys can do just as they please, but,' I says, 'I will give you no affidavit.' Now that was one conversation with Mr. Imus." I never interfered or made any suggestions to Shotswell or Pomeroy about testifying or making affidavits. I had a subsequent conversation with Mr. Imus. "Mr. Imus came down there—now I can't remember the date of that, but it was some place probably a month after—and he said that he had word from his attorneys-friends in Tacoma I supposed. I didn't know who the attorneys were. I didn't know that Mr. Langhorne was interested in this [305] case at that time. He says, 'Now, Cap,' he say, 'it would do me a great favor and,' he says, 'it would be a

big help to me,' he says, 'if you would give me the affidavit that Stewart was drowned.' I says, 'Mr. Imus, I wouldn't give it to vou.' If you want me to tell all this case I will tell the whole thing."

Recross-examination.

(Mr. LANGHORNE.)

I wanted to keep it forever a secret that six men got off the boat but I changed my mind. I changed my mind the day they refused to send me that 100 gallons of oil, which was about the 15th of April. I then told Mrs. Reid and nobody else until about the 15th of March, 1922. I then told Mr. Bryce. At the time I told him we were in his office at Portland. Mr. Brvce is here in the courtroom. [306]

Testimony of B. K. Bartleson, for Defendants.

Thereupon, the defendants called as a witness in their behalf B. K. BARTLESON, who, being duly sworn, testified as follows:

I have lived in Kalama eleven years, I am a fisherman. I have been on the Columbia River since 1895, fishing all the time. A number of fishermen got together for the purpose of clearing a space of ground on the bottom of the Columbia River for fishing purposes at that particular place, that is a This man Hansen, who testified, was emdrift. ployed by us as a diver. This drift was located one-third of a mile below the Kalama dock and extended from the Washington shore out about 500 feet and goes to Kalama River, about one mile and (Testimony of B. K. Bartleson.)

a half long. In the fall of 1920 and before March 17, 1921, we cleared this drift of snags and chunks and whatever obstruction there was on the bottom so the net could drag on the bottom for catching salmon. On March 17, it was pretty well cleared of obstructions. The outside of the river channel is practically all sand and on the inside of the drift near the shore it is all clay. Just beyond the drift that we had there was another, the Kalama drift which was alongside outs. In all my experience in the Columbia River, I know of only two bodies of drowned persons that were not recovered. The current at Kalama in the Columbia River in low stage is about two miles an hour. At certain stages of the water the tide comes up this river. That tide runs in the bottom as well as on the top. If a body were caught in a snag floating down the river, I judge that the tide would help [307] move it from anything it was lodged against, the current running up stream. I have seen the tide run as far as two miles up the stream at Kalama.

Cross-examination.

If a body should be lodged between two snags or the clothing hooked on to a sharp root or snag, then the effect of the tide would not raise the body.

Of my personal knowledge I know two bodies that went into the river that were not found. I may be that a great many bodies went into the river that I never heard of which were never found. I just tell my own experience, just what I personally know. The drift that I spoke of starts at the foot

(Testimony of B. K. Bartleson.)

of the old incline, right at the very last dolphin in the old ferry, which is half a mile down stream from Reid's boat landing. From there it extends out into the river about 500 feet, and down the river to the mouth of the Kalama River. The present ship channel is out about 1,000 feet from the depot. It bears towards the Washington shore.

Q. Now every time there is high water the river is above, going above, out of the banks, the raising up catches logs and stumps and roots and brings them into the channel and into the river and washes them down, and as they go they become more or less waterlogged and sink as they go along during the high water? A. Yes.

On the 17th of March, 1921, the Columbia River was rising very fast. Possibly there were snags and chunks being deposited during that period. [308]

Redirect Examination.

The Kalama Drift is 900 feet wide and our drift 500 feet.

Testimony of Captain Simpson, for Defendants.

Thereupon, the defendants called as a witness in their behalf CAPTAIN SIMPSON, who, being duly sworn, testified as follows:

I have lived in Kalama thirty years. I was pilot on the ferry-boat "Tacoma," the ferry-boat that was owned by the railroad company and carried the railroad cars across the Columbia River. I was Captain of this ferry-boat for twenty-five years, practically from its first trip to its last. I have lived on

(Testimony of Captain Simpson.)

the Columbia River forty-five years. I should say that the bodies of persons drowned in the Columbia River during all my experience were usually recovered. I do not recall any specific instance where the body was not recovered. I remember the instance of a man being practically drowned at Kalama on one Christmas Eve. I was alongside the ferry-boat. I went down twice after him and was in the water each time; I finally brought him up and he subsequently revived. As a rule the March freshet lasts only about four days, the real flood in the Columbia River takes place later in the year, April, May and June. From my experience in the river, I do not think that the bodies of persons drowned always go to the bottom. I have been familiar with the river for a great many years. I draw Defendant's Exhibit "D" as a rough map showing Cottonwood Island and the channels of the river in the vicinity of Kalala where the ferry-boat runs. "The river bank runs southeast by east, in this direction, until it gets down to the Mountain Timber Company's mill and than it sheers off to the mouth of the Kalama River in [309] that direction, which forms a bight in here. The Kalama River came in this direction. Right opposite Kalama there is a long shoal island here, there is a shoal at the head of the island and the island itself coming that shape, the Oregon shore on this side. There is a channel down the Oregon side and there is a channel down the Washington side. The force of the water runs down here and then sheers off to

(Testimony of Captain Simpson.)

what they call Mount Coffin on the Oregon side. This is a bluff. That in turn is sheered off toward Cottonwood Island. The course of the ferry-boat. if this is Goble, would be across here; that is it crosses this deep water channel and strikes the shoal. There is a heavy shoal comes around nearly all the way across to the Washington shore. The ferryboat course is across here and then straight up here. Is that what you want?" "Cottonwood Island is shown here. This would be the head of—this is what they call Coffin Rock. Coffin Rock is right here. This is a high bluff right here, and the head of Cottonwood Island here. Then comes another slough down in here, what they call Cottonwood Island Slough. The river is divided after it sheers here. Part of it goes down through here, but the main channel goes down the Oregon side." The place marked "B" is the bluff that I have spoken about; the place marked "C" is Cottonwood Island; and the Slough is the place marked "D"; Coffin Rock is the place marked "R"; the place marked "G" is Goble: the Sand Island in front of Kalama is marked "I"; the mouth of the Kalama River is marked "X": the place designated "Island" at the bottom is shoal water here from the island. The tendency of the water down this side is toward the Washington shore and the tendency on this side is toward the Oregon shore. But currents meet here and form slack water which forms a shoal. The place marked "M" is where these currents meet. That would be where the turn is. There

(Testimony of Captain Simpson.)

is more or less of an eddy either way along these [310] Island all the way down. The currents reverse at the point marked "N." From my experience with this river, an object like a human body fully clothed with an overcoat on falling from the ferry-boat at the place described by the witnesses, would be found "about Cottonwood Island." This Sand Island in front of Kalama in ordinary weather is anywhere from a mile to a mile and a half long, in high water about a half a mile. At the time I went into the water to rescue this man that I testified about I was sixty-five years old.

Cross-examination.

(Mr. IMUS.)

I am not a diver. I have never been down to the bottom of the river to see what the formation was. There may have been quite a number of people that were drowned in the river and their bodies never recovered.

Testimony of Daniel McCoy, for Defendants.

Thereupon, the defendants called as a witness in their *half* DANIEL McCOY, who, being duly sworn testified as follows:

My name is Daniel McCoy, I have lived in Kalama since 1910 and in the Columbia River since 1888. I have been a fisherman since I have been on the river. From my experience the bodies of people drowned in the river have been found. I have had experience in clearing the bottom of the river for fishing. That the drift as described

(Testimony of Daniel McCoy.)

was good. I worked a day and a half searching for the body of Stewart. I should judge there were five or six other boats searching for his body, different rigs. Some of them worked there every day for a whole week. The way we dragged for his body was: "We took two boats, we took a line about 200 [311] feet long and we have sturgeon hooks what we use for catching sturgeon there—they are a good big hook about that length. about two inches, with an inch and a half or two inch circle—we put them every twelve inches on this line, we put a weight on each end of that and a boat on each end of it to keep it stretched out and we drug that down the river." The others had a similar outfit some of them used barbed wire. I have no reason for believing that Stewart's body was recovered up in the river at the time we were dragging for it. The way I figure it in my mind, if he drowned where they claim he went overboard he would be on the bottom before he got to the Kalama river.

The captain on the ferry-boat said he last saw Stewart after they entered the dolphin at the foot of the Island and had headed for Kalama. He showed me about where he last saw him. By the dolphin I mean the point marked "M" on Defendant's Exhibit "D."

Cross-examination.

(Mr. IMUS.)

Kalama River is about two miles from the dock situation in the town of Kalama. It is below the

(Testimony of Daniel McCoy.)

lowest point touched by the "Queen" in making the round trip between Kalama and Goble. The Columbia River is about a mile and an eighth wide straight across from Goble. When we dragged the river with the hooks we went down as far as the mouth of the Kalama River. As far as I know the river was not dragged any lower down than that. If a body was in the bottom of the river and covered up with three or four or five inches of sand or dirt I don't think sturgeon hooks would plow down a foot or a foot and half in the ground.

I have heard of bodies going into the Columbia River that were never found. [312]

Redirect Examination.

(Mr. RUPP.)

I have no reason to believe that the body of Stewart, if he is in the river, was covered up with a foot of sediment. I didn't drag below the mouth of the Columbia River for the body because I didn't think it would be policy. I figured that if he went overboard where they claimed, that he would be on the bottom before he got that far. All I know about where he went overboard is what Captain Pomeroy told me.

Testimony of George Elwood, for Defendants.

Thereupon GEORGE ELWOOD, called as a witness in behalf of defendant, being duly sworn testified as follows:

My name is George Elwood, I am forty-eight

years old, and am traveling salesman. I have lived in La Verne, California a little over two years.

I moved from Cottagegrove, Oregon to LaVerne, before that I lived at Kelso, Washington and other towns on the Columbia River near Kelso for several years. I was born in Michigan, moved to Portland, Oregon with my parents and lived in that city about twenty-nine years. I lived at Kelso about two years. I left Portland about 1904 or 1905, I went to Kelso. When I lived in Kelso and the other towns near by, I was a barber and while located in Kelso, I shaved Mr. Stewart at least twice a week and I saw him daily. I saw Mr. Stewart before going to California in February. 1920. I talked with him then. I was familiar with his appearance and his walk then. The next time I saw Mr. Stewart was on March 24th, 1921, at Hanford, California. Hanford is Southwest of Fresno about forty miles. I happened to be in Hanford because I was making the valley with my line, was there as a traveling salesman. I was in Hanford the biggest part of three days. I never was in Hanford before. "I was standing in the barber-shop with my hand against the casing between the door and the window, a swinging door. I was talking to [313] the barbers, and as I looked out I saw Mr. Stewart in company with someone else and he was virtually facing me, but turning to go back, and I turned around to the barbers and I says, 'There is an old friend of mine. I am going out.' I stepped out the door

and he was walking fast towards an automobile and as he got behind the auto or right by the automobile he turned directly facing me and turned his head quick again before I had an opportunity to hail him and got in the automobile and went away." That was Frederick L. Stewart who formerly lived at Kelso. I noticed Stewart's walk at that time. He has an individual walk, he stood more erect than I do, he had a quick movement about him. It was very characteristic of him. I never noticed exactly the same thing in other people. His habit of walking and standing is he simply squared himself, he always walked erect, he carried his head rather stady, would move it slightly. He had, on that day, a gray suit on, a gray overcoat and a cap similar, a soft cloth cap. While I lived in these other towns near Kelso, I hardly think there was a year I did not see Mr. Stewart. I met him in Portland a couple of times while I was there. I knew him altogether from 1904 to 1920. He had a habit of recognizing me, he was always pleasant, if I did not see him he always saw me. Witness is shown Defendant's Exhibit "E" and states: This is a fair picture of the barber-shop where I was standing on the sidewalk when I saw Stewart. At that time, I was standing where the picture of the man appears in the right of this picture, just back of the bootblack stand. The picture of these two men in the picture standing represents the location of Stewart and the man who was with him, at that time. I am now

examining Defendant's Exhibit "F." It is a fair representation of the street [314] and it shows an automobile standing about where I saw the automobile stand that Stewart got into, it stands exactly near as I can tell. I am now looking at Defendant's Exhibit "G." It is a fair photograph and representation of the street showing the barber shop where I was standing and also the automobile that I saw Stewart get into. Exhibit "E," "F" and "G" received in evidence.

Cross-examination.

(Mr. LANGHORNE.)

I left Kelso for good in 1906. I went from there to Stella. It is about fifteen miles from Kelso. I lived in Stella for two years. I then went to Portland. I lived there about two years. I went to Portland from Clatskani which is situated on the Columbia River halfway on the Oregon side. I lived there until 1913. I moved to Forest Grove, Oregon, and went to work on the road. Forest Grove is about twenty-six miles from Portland. I then moved from there to Cottage Grove, Oregon. When I left there I went to California. I went to California in 1920. I saw Fred Stewart in Kelso in February, 1920. I met him in Portland in 1914, I think. I didn't see him between 1914 and 1920. I saw him in Murphy's barber shop in Portland in 1914.

I was in Hanford, California, on March 22, 1921. I left Fresno on March 21st and got into Hanford in the evening. I don't recall the time. I was in

Fresno on March 20th. At that time I had an order book with me. I had that same book when I was in Kalama in May of last year. I put that book down in my house in La Verne, California. I [315] wouldn't swear that Mr. Wilson never saw it. I first met Mr. Wilton in Ogden, Utah. I made and signed an affidavit at that place and gave it to Mr. Wilton. That is my signature attached to the affidavit which you show me. I stated in that affidavit that while I "was standing in a doorway in Hanford, California on or about March 24th, I saw a man whom I took to be Mr. Frederick L. Stewart." I did not talk with the man I say was Stewart. At the time I caught sight of him he was about thirty feet away, as near as I can tell.

- Q. Crossing the street?
- A. No, sir; not crossing the street; no, sir.
- Q. Standing still?
- A. No, sir; turning.
- Q. Turning? A. Yes, sir.
- Q. Away from you? A. Yes, sir.
- Q. Turning away from you?
- A. Turning away from the way I was facing.
- Q. Which way did he go then?
- A. Down the street from me.
- Q. Down the street from you with his back to you? A. Yes, sir.

There was someone with him who was shorter and rather chunky built. I have never seen this party before to my knowledge.

I was in Kalama on May of last year. I think

it was April but I am not sure. I was in M. C. Taylor's barber-shop while I was in Kalama. I might have discussed the matter of Fred Stewart's disappearance while there. I don't think I [316] said while in Taylor's barber-shop in Kalama in April or May of 1921 in the presence of George M. Campbell that I saw a man I took to be Stewart in Hanford, California on February 22, 1921, and that I knew it was that day because it was Washington's birthday. I don't know Campbell or Lawrence Perry but I know the Taylor brothers.

Q. Did not one of these three persons then say to you that Stewart did not disappear until the night of March 17th, and then did you not go and get your order book and look at it?

A. No, sir.

Q. You swear that nothing of that kind happened?

A. No, sir, I never referred to that order book until I got into Kelso.

Q. And did you not say there in the presence of these men or in the presence of Lawrence Perry that while you thought you saw Stewart in Hanford, California, you could not swear to it?

A. I may have.

After I left the barber-shop I went to take the train to Kelso. I don't know Paul Shotswell. I have seen him before. I don't remember whether I engaged him in conversation after I left the barber-shop about Stewart's disappearance.

Q. Did you not in that conversation with Shots-

well say that you thought you saw Stewart in Hanford, California, and didn't Shotswell challenge your statement and say that Stewart was drowned and did you not reply by saying that you were not positive it was Stewart you saw in Hanford, California, or words to that effect?

A. No, sir. [317]

After I got to Kelso I went to Mr. Hunt's barbershop. While there some one wanted me to make an affidavit that I had seen Stewart in Hanford, California. I don't know who he was. He was lying in the barber's chair at the time. I don't think I told the party that asked me to make this affidavit that I would not make it because I might be mistaken as to the identity of Mr. Stewart. After I left Kelso I went to Aberdeen, Hoquiam and then to Olympia.

I know Dr. Byrd. I accidentally shot him at one time. I met Dr. Byrd in Olympia when I returned from Grays Harbor. I did not tell Dr. Byrd in the conversation I had with him that I thought I saw Stewart in Hanford, California, but would not positively swear that it was him. I remember distinctly the last thing that I said to Dr. Byrd was that if the man I saw was not Fred that his wife would not want to see this man I did see because she would claim him. After leaving Olympia I came to Tacoma and met Frank Sardam and Mr. Fitch. The three of us went up to your office.

Q. Did you make this statement in my office under date of May 14th in the presence of myself, Frank

Sardam and H. G. Fitch: "My name is George Elwood. I live near Ramona, California. I travel for a barber supply house. I once lived at Kelso. Knew Fred Stewart when I lived there. Have been away for several years. I was in Hanford, California, on March 24th. I think that was the date. I was in a barber-shop and looking into a glass on the rear wall. I caught sight of a man going diagonally across the street that I thought was Fred Stewart. I went to the door and called to him but he paid no attention to me. I walked out on the sidewalk and then [318] I thought he did not want to recognize me. I did not talk to him. He was some distance away. Of course I am not positive it was Stewart. I would not swear it was. I have been mistaken about the identity of persons several times. Not long since I walked up to a lady on the street that I thought I knew and greeted her, but she did not respond, and I took another look and found I was rankly mistaken." Did you make that statement in my office?

A. I never made such a statement. Some of it is true but some of it is absolutely untrue.

I did not tell you at that time that I would not swear that it was Fred Stewart. I told you I would not give you an affidavit at that time. When I got to Utah I came to the conclusion that the easiest way out of it was to make the affidavit as I was being annoyed by everybody. I gave the affidavit to Mr. Wilton. I next saw Mr.

Wilton in Hanford, California. I met him there by arrangement.

When I was in Hanford, California, in March of 1921 a barber to whom I sold some goods gave me a check for \$5. I don't remember the date of the check.

Mr. KEENAN.—It is attached to the disposition. (Witness shown check.) It is dated March 21st.

- Q. Now after looking at the date of that check will you swear that it was on the 24th day of March, 1921, that you were in Hanford? A. Yes.
 - Q. That you saw Stewart there on that date?
- A. Yes, I will swear to that, on or about the 24th, as near as I can tell.
 - Q. How close to the 24th? [319]
 - A. The 24th.
 - Q. The 24th?
 - A. To the best of my knowledge on the 24th,
 - Q. How?
- A. To the best of my knowledge on the 24th day of March.
- Q. Well, what have you got in the way of memoranda about you, or have you had, to show it was the 24th day of March?
 - A. I haven't anything but that check.

The man that gave me the check is a friend of mine. I know him. I would believe his word. I would say that if he testified that it was the 21st of March that I went out on the street and said something about seeing a man from Washington, I would say he was telling something that was

not true. He could be mistaken at that.

I know Benjamin Vienna but he was not in that shop.

I know George Hedges. He is the party that gave me the check for \$5.

It was between one and two o'clock in the afternoon that I saw Fred Stewart on the street.

When in Hanford with Wilton he had a photograph of Fred Stewart similar to the one now shown me.

- Q. Now you say you saw Fred Stewart in 1920?
- A. Yes.
- Q. How did he wear his hair then?
- A. In 1920 he wore it combed back.
- Q. You heard me say that here yesterday, didn't you?
 - A. I heard you state that here yesterday?
 - Q. Now you—

Mr. RUPP.—Let him answer. [320]

- A. I don't remember you stated that here yesterday. I may not have been in the room.
- Q. Did you tell Wilton that he did not wear his hair that way then?
- A. No, I was not interested in the case. I am not working in the case.

When I was in Kelso in May, 1921, I met Mr. Hill who is a barber. I know him slightly. I did know Mr. Crouch the druggist slightly. I did not tell Crouch that I would not sign an affidavit about seeing Fred Stewart in California unless they guaranteed me \$10 per day and all ex-

penses. I never told John Hill that either. I never made that remark to my knowledge. I said I could not afford to spend my time unless it amounted to about that because I was making that much money.

Mr. LANGHORNE.—I offer this affidavit in sevidence.

Paper referred to admitted in evidence and marked Defendants' Exhibit 33.

I came here from Laverne, California, to testify in this case.

Redirect Examination.

I saw Mr. Crouch soon after I got in Kelso in April or May. I had a conversation with him about seeing Stewart in California. He asked me about the date. I showed him my order book where the date appeared. Crouch is living in Kelso now. I have no distinct recollection of any of the conversations I had with any of the people. "Now, take Dr. Byrd there for instance, thinking that he was a good friend of mine, I naturally told him what I absolutely knew about it." Other times people harassed me I would put them off probably the easiest way I could and get rid of them. I didn't have time to do that and my business too. In the letter that was the means of bringing me into Mr. Langhorne's office there was enclosed a Traveler's Insurance Company's card. I have lost the letter, it stated in substance they wanted to see me about the [321] Stewart case. The party who signed the letter proposed to represent the

Traveler's Insurance Company. He enclosed his card and told me to call a certain telephone number when I got to Tacoma. I met these men in Mr. Langhorne's office. M1. Langhorne asked me questions and I answered them just about as I answered other people. I refused to make an affidavit. I could not have made an affidavit and sworn to the truth if I were to say that I did not see Stewart in California.

"Q. Now this affidavit that Mr. Langhorne has called your attention to the first sentence of which he read. I will now read the next sentence: 'George Elwood, being first duly sworn, deposes and says that I was standing in a doorway at Hanford, California, on or about March 24, 1921, when I saw a man whom I took to be Mr. Frederick L. Stewart and another man leaving a near by restaurant. I am positive it was Mr. Stewart. When I reached the sidewalk he was starting around the automobile to enter from the left side, while his companion was opening the right-hand door. When Mr. Stewstarted aroud the automobile he looked directly toward me. As I started to hail him he turned his head like he didn't want to recognize me. The automobile then left at a rapid pace. I fully believe he had recognized me but did not care to speak to me, which I could not understand, as we were old friends. At this time I knew nothing about Mr. Stewart's trouble at the Kelso State Bank at Kelso, Washington, but was later informed of his trouble by a friend upon (Testimony of George Elwood.)
my reaching Cottage Grove, Oregon, about a month
later.'

- Q. Was that true then? A. Yes, sir.
- Q. Is it true now? A. Yes, sir.
- Q. Tell the Judge who dictated that statement.
- A. I did. [322]
- Q. Did Mr. Wilton have a thing to do about it?
- A. No, sir. He told me to give it from my own free will. He said, 'All we want to know, Mr. Elwood, is the truth and just give it in your own way.' And that is the way I dictated it.''

Recross-examination.

When I went to Kelso I showed Crouch my order book. I think he asked me about it. He was asking me about the date that I saw Stewart and I says, "If I have a certain order book here in my grip I can show it to you." It was the same order book I had at Kalama.

- Q. You know your order book would show you when you were in Hanford?
- A. I knew when Mr. Crouch was talking to me that I could show him that I was there.
 - Q. Well, you had it when you got to Ogden, Utah?
 - A. Well, I believe I did.
 - Q. And you had it when Mr. Wilton was there? A. Yes, sir.

The COURT.—I want to straighten out something. You came back to Cottage Grove after you saw this man at Hanford?

The WITNESS.—Not back to Cottage Grove, but on my way.

The COURT.—You worked your way up until you got to Cottage Grove?

The WITNESS.—Yes, sir.

The COURT.—You say you got there about a month after?

The WITNESS.—Something like that.

The COURT.—How long were you there?

The WITNESS.—I Sundayed there. I have a sister-in-law there. [323]

The COURT.—Mr. Stewart was not married when you were in Kelso—when you were barbering? The WITNESS.—No, sir.

The COURT.—But he was married when you saw him in 1920?

The WITNESS.—Well, I understood that he was. I never met him before.

The COURT.—But you understood he was married?

The WITNESS.—Yes.

The COURT.—And you didn't learn about the claim that he had been drowned until you got back to Cottage Grove?

The WITNESS.—No. sir.

The COURT.—How long after you got to Cottage Grove until you came to Kelso?

The WITNESS.—Well, you see it would take several days because I made Portland. It was not very long.

The COURT.—A week later?

The WITNESS.—It would probably be a little more than a week.

The COURT.—Two weeks?

The WITNESS.—Well, somewhere around there. Sometimes I would take a week in Portland but this time I only spent one day.

The COURT.—After the time you learned at Cottage Grove that Stewart was supposed to be drowned did you do anything to communicate with his wife or anybody at Kelso that you had seen him at Hanford?

The WITNESS.—No, sir.

The COURT.—Call your next.

Deposition of Spiro Papilian, for Defendants.

Thereupon the defendants called as a witness in their behalf SPIRO PAPILIAN, who, being duly sworn, testified as follows by deposition taken at Hanford, California, on stipulation of all [324] parties to the action, at the taking of which deposition plaintiff was represented by Maurice A. Langhorne, Esq., and the defendants by S. A. Keenan, Esq.:

My name is Spiro Papalian, I am forty-six years of age and in restaurant business, since 1905, here in Hanford. I was in that business last March 20 to 24, 1921. I was in the restaurant operating it at that time. Defendant's Exhibit "C" appears to be a picture of the man that was served in my restaurant March 23 or 24. It looks like exactly the party that was waited on. He was pretty nearly six feet tall, he was slim, not very heavy, his face looked like it was long. This pic-

(Deposition of Spiro Papilian.)

ture looks like his face was fat, his face was long. This picture, Defendant's Exhibit "D" looks like that man I saw because he was not very fat man. Exhibit "D" looks more like his face. This Exhibit "C" looks like the face is too fat for the man I saw. This man I saw wore glasses, he stuck them on his nose. The general color of his hair was a little brown and a little gray around here (indicating). His hair was kind of trimmed just cut with the scissors. It was just a little bit curly. Another man came with him. They came together, ate together and left together.

Cross-examination.

(Mr. LANGHORNE.)

I came to the United States in 1901. It is pretty hard for me to talk good English. I was naturalized in Hanford, Kings County, in 1911. I have run a restaurant here since 1905. During that time I have fed many thousands of people. I was in my restaurant during all the month of February, 1921. I went to Stockton during the first week of March, 1921. I left [325] here Saturday.

Q. Referring now to Defendant's Exhibit "C." had you ever—that party that you say you think was in your restaurant, had he ever been in there prior to that time, before?

A. About two or three meals he been eating there before I left.

Q. Did you understand my question? That party (referring to Defendant's Exhibit "C") had he ever been in your restaurant before this time that (Deposition of Spiro Papilian.)
you have just testified to? A. Yes, sir.

- Q. How many times?
- A. Oh, two or three times.
- Q. Was it on the same day? A. Oh, no.
- Q. Well, how long before?
- A. I don't remember, you see, the time he come. I can't tell very well.

Redirect Examination.

(Mr. KEENAN.)

I can't tell exactly how many people I fed in my restaurant. I don't remember when he ate the other two meals. I don't know whether he ate three meals on the same day or whether he ate two meals but I am quite certain that I saw him eat the meals and on three different occasions. Defendant's Exhibit "E" is a picture of my place, it shows a picture of the Brunswick Barber Shop. My place is just in front of the automobile. From the place marked "X" on this picture to the rear of the automobile is about forty-five feet.

Deposition of Benjamin Vienna, for Defendants.

Thereupon, the defendants called as a witness in their behalf BENJAMIN VIENNA, who, being duly sworn testified as follows by deposition taken at Hanford, California, on stipulation of all parties to the action, at the taking of which deposition [326] plaintiff was represented by Maurice A. Langhorne, Esq., and the defendants by S. A. Keenan, Esq.:

My name is Benjamin Vienna; am twenty-five years old, am a barber, have lived here three years and have been working all the time as a barber. I have been working in the Brunswick Barber Shop practically two years. I was there last March, I was there the 23d and 24th. There are four chairs in the shop, three workmen and the boss. Four men were working there last March. The picture marked Defendant's Exhibit "C" appears to be a picture of a customer who came into my shop the 23d or 24th of March last. I served him, cut his hair. His hair was kind of crimpy, it was pretty long. He gave his instructions as to how it was to be cut. He told me to put the clippers in the marked lines—not to use the clippers around the ears, to trim with the shears, but to leave it medium. When I finished his hair was cut practically the same as presented in the picture only a little closer. His hair was brown and also some gray around the edges, I mean around the ears. I judge he was forty or past, about six feet tall, he stood quite erect. I know George Elwood, he is a traveling salesman for barber supplies. I recall he was in the shop the same day. I recall Elwood was in the shop when he went out to greet a friend. I will state what happened then: "They were standing there discussing about selling me a strap. I told him I didn't want one, and he was just going to leave, and was standing at the door, he was looking down the street toward the restaurant, and about that time, he said, 'Just a minute, there is a friend of mine,' and he

rushed out the door, and when he went out the door I followed up, and looked down the street to see what was going on, a little inquisitive, and he come back, and I seen a man get into the machine, I walked back in the shop, and he come in, and he said, 'I guess he don't want to recognize me ... " And when he returned into the shop he said, "An old [327] friend of mine, he don't want to recognize me. I used to shave him, he is an old friend of mine." He seemed to be worked up over the fact that the man did not recognize him, did not want to recognize him. I went to the door and recognized the man as the party I had served in my shop. He wore nose glasses, ones that just fasten on the nose, they were not suspended with a string. Defendant's Exhibit "F" is a picture of the barbershop, it is just back of the shoe black stand. At that time, Elwood was standing in the shop at the window just as appears in the picture. As you look at this picture the man who I served and who Elwood greeted would be to the left. Defendant's Exhibit "E" is a picture showing the Olympia Cafe and my shop. The Olympia Cafe is to the left, as I look at the picture. I see the picture of the automobile The automobile I saw on that day was standing just about as shown in this picture, I saw this man as he was getting into the machine. Defendant's Exhibit "G" is a picture showing the Olympia Cafe. The man shown in this picture with a light suit on is standing just about the place where I saw the man I served in my shop standing

just before he got into the machine. The car did not remain after he got into it. It started right off and lost no time. Defendant's Exhibit "H" is a fair picture of the street that runs in front of the shop and the Olympia Cafe.

Cross-examination.

Mr. LANGHORNE.—I was born in Los Angeles, California, have lived here all my life with the exception of the time I was in the navy. Hanford is a town of about six thousand people, situated on the line of the Southern Pacific and on the main line [328] of the Santa Fe Railway Company. I have not seen many visitors here. It is practically off the main line of the Santa Fe, that is most traveled in this time. The population of Kings County is twenty-two thousand. I will not say the exact day when Elwood was in the shop. All I know it was around March—some time in March. I know it was the beginning of the baseball season and I know it was in March. I saw this picture some time in September, Mr. Wilton showed it to me. Mr. Wilton did not suggest to me that I saw the original of that photograph, nobody made that suggestion to me. They just brought the photograph in the shop and let the boys look at it. "I looked at it, and said, I seen that fellow here before, that is all I said, that I seen that man." I swear on my oath, as a man, that the person shown by the photograph marked Defendant's Exhibit "C" is the identical person whose hair I cut in March.

without any question of doubt. I had a little reason for paying particular attention to this man, he was particular about his hair, particular about the way he wanted it cut. I recall a man by the name of Smith, a Notary, coming to me sometime ago with an affidavit about my testimony. I suggested I ought to get something, but when I found out that it was unjustified by making such a suggestion I dropped it. I have been paid nothing for my testimony in this case. I have been promised nothing.

Redirect Examination.

Mr. KEENAN.—I never received a request from you (Mr. Keenan) or an affidavit for me to be signed by me. I never received a communication from the Prudential Insurance Company or any other Insurance Company to sign an affidavit in this case. I never talked with you (Mr. Keenan) about this case before to-day, for a half hour. [329]

Deposition of J. A. Moore, for Defendants.

Thereupon, the defendants called as a witness in their behalf J. A. MOORE, who, being duly sworn testified as follows, by deposition taken at Hanford, California, on stipulation of all parties to the action, at the taking of which deposition plaintiff was represented by Maurice A. Langhorne, Esq., and the defendants by S. A. Keenan, Esq.:

George Elwood stopped at my hotel between the sixteenth and the twenty-fourth of March. Photograph copy of the hotel register is marked De-

(Deposition of J. A. Moore.)

fendant's Exhibit "I." The originals of the hotel registers are offered and received in evidence without objection marked Exhibit "J" showing the signature of George Elwood. I am not positive but I think he stopped two nights.

Deposition of George Hedges, for Defendants.

Thereupon, the defendants called as a witness in their behalf GEORGE HEDGES, who, being duly sworn testified as follows, by deposition taken at Hanford, California, on stipulation of all parties to the action, at the taking of which deposition plaintiff was represented by Maurice A. Langhorne, Esq., and the defendants by S. A. Keenan, Esq.:

I know George Elwood, I met him last March and did business with him the twenty-first day of March. I bought a pair of clippers from him. Defendant's Exhibit "K" is the check I gave Mr. Elwood when I bought the clippers. This check was delivered by me to Elwood here in the city personally.

Deposition of William Paul Koeper, for Defendants.

Thereupon, the defendants called as a witness in their behalf WILLIAM PAUL KOEPER, who, being duly sworn testified as follows, by deposition taken at Hanford, California, on stipulation of all parties to the action, at the taking of which deposition plaintiff was represented by Maurice A. Langhorne, Esq., and the defendants by S. A. Keenan, Esq.: [330]

(Deposition of William Paul Koeper.)

I am twenty-nine years old, am a barber, have lived in Hanford since October, 1920. I have been working in the Brunswick Barber Shop since that time, I worked there last March. I remember George Elwood. I was in the shop when Elwood was standing at the window, and he said, "There goes an old friend of mine from Washington." As soon as he said that, Elwood stepped outside the door and tried to call his attention, and he was gone. When he returned into the shop he said, "The gentleman will not recognize me," that was some time in the afternoon, I don't know the exact hour, I did not see the man he was attempting to greet.

Cross-examination.

Mr. LANGHORNE.—I bought a strap and a pair of clippers from Elwood. It was the twentieth of March. I got a guarantee slip with the clippers, I put it down March, 1921, the date of the guarantee of the pair of clippers.

Deposition of Orvalle Onorato, for Defendants.

Thereupon, the defendants called as a witness in their behalf ORVALLE ONORATO, who, being duly sworn testified as follows; by deposition taken at San Diego, California, on stipulation of all parties to the action, at the taking of which deposition plaintiff was represented by Maurice A. Langhorne, Esq., and the defendants by S. A. Keenan, Esq.:

My name is Orvalle William Onorato; my age is

twenty-two years. I was born in Kelso, Washington. I am in the United States Army, Air Service, enlisted July 7, 1919, at Vancouver Barracks, Vancouver, Washington. I lived in Kelso all my life except four years that I was overseas and three years in the army. My home has been there all my life. I spent four years overseas with my folks, not in the service. I was in Europe from [331] 1907 to 1911. I was born in 1900. From 1911, I lived in Kelso all my life excepting when I have been in the service. Since my enlistment I have been back to Kelso once. I knew the banker, Fred Stewart at Kelso. I transacted business with him for my father. Once or twice, I believe I made a deposit in the bank for my father. I was present with my father on two occasions when he talked with Stewart in the street or elsewhere. I have talked with Mr. Stewart. He knew me all the time I lived in Kelso. I lived a mile from the main part of town. Our farm was just a few rods from the town. I saw Mr. Stewart last April in the city of Pasadena about the 26th of April, just before noon. It was a clear day. We were driving along the street, on the right-hand side of the street, and my attention was drawn to a man from the peculiar swing of the arms and walk, and getting near I recognized it to be Frederick L. Stewart. I took a good look at him from the front, passing to the side and then looking back. I saw his face, I saw him walk away, when I first saw him I was approaching him. A man

was walking with Stewart, he was shorter than Stewart. I happened to be in Pasadena that day because we were driving to Los Angeles, to the motorcycle races on the 26th and with some boy friends. We started from San Bernardino. I was stationed at that time at March Field, located about ten miles east of Riverside. The machine belonged to Hall brothers, the boys who were with me. The Hall boys were about twenty years old. We started about nine o'clock that morning and returned that night. I am looking at Defendant's San Diego Exhibit 1, offered and received in evidence without objection, it is a photograph of Fred Stewart, the picture does not represent him as he looked when I lived in Kelso. He looked older when I lived in Kelso than this picture shows and when I saw him in Pasadena he looked older than this picture shows. [332]

Cross-examination.

(Mr. LANGHORNE.)

We drove from San Bernardino to Pasadena on Spril 26th, 1921. We left San Bernardino about nine in the morning and passed through Pasadena about noon or a little before on that date. It is not so far between the two places. We did not stop on the way. We were driving between twenty and twenty-five miles per hour between San Bernardino and Pasadena.

I believe I was in San Bernardino on the night of April 25th. I don't remember, at what hotel

I stopped. I did not stay with the parties that owned the automobile in which we rode from San Bernardino to Pasadena on April 26th. I don't remember how much I paid for my room on the night of April 25th. The automobile that we were in on April 26th is owned by the Hall brothers. I do not know the first name of either one of these boys. I met them in San Bernardino. Prior to leaving March Field and going to San Bernardino I had no engagement to go with the Hall boys to the place I have mentioned. I believe I met the Hall boys on the afternoon of April 25, 1921. I met them on the street in San Bernardino. I just happened to meet them. They took me home with them. I have forgotten where they live in San Bernardino. It is near Third Street. I only remained there a few minutes on the afternoon of April 25, 1921. I don't know where I went after I left their place. I don't remember the kind of a hotel that I stayed in on the night of April 25th. I don't remember what part of town the hotel was situated in. I can't say how many times I have been in San Bernardino prior to April 25, 1921. I had made frequent trips there.

When we got to Pasadena we went straight through. [333]

I have been mistaken before about the identity of persons. The possibility that I was mistaken about Mr. Stewart is very scarce.

Q. How far away from this party were you when you first caught sight of him?

- A. About one hundred or one hundred twenty feet.
 - Q. How fast was your machine going?
 - A. Slow.
 - Q. What street was it on? A. I don't know.
 - Q. Have you ever been back there since?
 - A. No, sir.
 - Q. Did you speak to him? A. No, sir.
 - Q. Did you holler at him? A. No, sir.
 - Q. Did you wave at him? A. No, sir.
 - Q. Why didn't you?
- A. Well, before I had made positively sure it was he we had passed him.
- Q. Let us see now, if I understand you correctly. Before you were positive that it was Fred Stewart you had passed him. Have I quoted you correctly.
- A. Before I was positive that it was Stewart I had come by the side and seen a rear view of him.

I went back to Kelso subsequent to April 26, 1921. I arrived there on May 23, 1921 and remained thirty-six days. While there I talked to J. S. Robb and an attorney named McKenney about seeing Stewart on the streets of Pasadena. [334]

- Q. Did you not tell Mr. Robb during the course of that conversation that I directed your attention to that you could not positively swear that the man you saw there in Riverside or Pasadena, whichever place it was, was Stewart?
 - A. I said I would not.
 - Q. You told Mr. Robb that? A. I believe.

Q. You told Mr. Robb then that you would not swear positively that the man you saw in the streets of Pasadena was in fact Fred Stewart?

A. I told him I was satisfied and positive it was, though I would not take an oath on it.

Q. And will not take an oath on it now then?

A. I cannot swear that it was positively he because I have no way to prove it was, but I am positive. I saw—

I saw Mrs. Stewart in Elsinore after I returned from Kelso to March Field. I returned from Kelso about the first of July. I saw her on the streets.

Redirect Examination.

Mr. KEENAN.—There were no pedestrians on the street near Stewart when I saw him, there were, further behind him but none with him and the other man when I saw him. There were no automobiles in the street nothing to obstruct my view. "If my brother had been walking on the sidewalk where I saw Stewart walk that day and I saw him just as I saw Stewart and under the same circumstances, I would not have recognized my brother any quicker than I recognized Stewart. I do not recall any conversation in Kelso about Stewart that I started myself. About every time I met [335] a friend he started to talk to me about Stewart, while I was in Kelso. I cut them. as short as I could to get rid of them. I saw Mrs. Stewart in Elsinore. What I mean is, if I saw my brother as I saw Stewart, "I would have posi-

tive it was him," but still by talking to him would be proof. I understand by these questions that Mr. Langhorne wanted me to be absolutely positive and be able to prove that that was Stewart. Now, if I do not have to prove anything at all but just testify myself I testify that was Fred Stewart I saw in Pasadena. I have no hesitancy whatever in testifying that that was Fred Stewart I saw at that time and place.

Cross-examination.

When I talked with Judge McKenney when I was in Kelso I think he told me that he was the administrator of Stewart's estate. I wouldn't go to his office to sign any affidavit. I did not want to be bothered. I was on a furlough there and have a good time. I came here to give my deposition because I was asked to.

Deposition of Arthur E. Pooley, for Defendants.

Thereupon, the defendants called as a witness in their behalf ARTHUR E. POOLEY, who, being duly sworn testified as follows, by deposition taken at San Francisco, California, on stipulation of all parties to the action, at the taking of which deposition plaintiff was represented by Maurice A. Langhorne, Esq., and the defendants by S. A. Keenan, Esq.

My name is Arthur E. Pooley, my vocation is a Purser and super-cargo on the steamer "Mazatlan." That steamer carries both freight and passengers from San Francisco to Mexico ports and

(Deposition of Arthur E. Pooley.)

return. I recall a trip where we left San Francisco about April 1, we got to San Pedro three days later. The first Mexican port was Ensenada. My business on that trip was looking after the freight and the general business of the ship passengers. etc., in fact all the bookkeeping and that work was done by the purser and super-cargo. I had charge of all the bookkeeping, came in contact with the passengers every day. Defendant's [336] Exhibit "A" is marked subsequently offered and received in evidence without objection. Defendant's Exhibit "A" absolutely resembles a person we carried on that voyage. I think he was in the forties. He was not as fleshy as that picture represents. This picture is a trifle younger than the man I refer to. Defendant's Exhibit "B" is offered and subsequently received in evidence without objection. Defendant's Exhibit "B" is more like the actual look than the other photograph, his face is thinner and he had wrinkles when he pulled back. His haid was brown as mine or light hair, it was a mixture of color, a mixture of brown with a little gray in it. You might call it sandy but not red, a mixture of brown. It was wayy. He had it cut the same style it looked to as Exhibit "A" and "B." He had a long slim nose his face was narrowed up to his chin, he was nearly six feet tall weighed about 160 pounds. He was a thin man. He stood erect with a habit of throwing his shoulders back in that kind of way (indicating movement) his walk was erect

(Deposition of Arthur E. Pooley.)

and sedate you might say. This man got aboard I think at San Pedro or Ensenada. I talked with him during the voyage, I had a conversation with him every morning, he called up my room every once in a while. He talked about Mexico, he asked me about what business chances were at Guadalara. He did not talk to me about his private affairs to my knowledge, he made a confident of no one on the boat. I had occasion to see him every day and did see him every day. He ate at the same table with me he talked with me there. He sat opposite me at the table. He talked with others some but seemed to talk with me most. The purser had charge of the valuables of the passengers. I received two packages from this man. They were about ten inches or so long and about two or three inches thick, and three or four inches wide. They were wrapped in brown paper and tied up with sealing wax on the knot. He took these packages up just before we got to Manzanillo. [337] Manzanillo is one of the principal towns, is a railroad town, can go by rail from there to Mexico City, via Guadalajara and Colima, and people can go from there into the United States by rail. Ensenada, is the first stop we make after reaching the United States is about thirty-seven miles from San Diego. The means of transportation from there to San Diego is by automobile.

Cross-examination.

Mr. LANGHORNE.—I am fifty-five years old, was born in Brooklyn, New York. I have lived

(Deposition of Arthur E. Pooley.)

in California since the earthquake and fire, about sixteen years. I have been in the steam boat business all the time as freight clerk, purser and supercargo. I lived in Winchester Annex Hotel. I have lived there off and on for four or five years. There were two other American passengers, I cannot give the description of them. It took us six days to go from San Pedro to La Paz. I did not notice about this man's teeth, I did not notice anything peculiar about his teeth. This case is of no interest to me. Witness is shown Plaintiff's Exhibit 1, for identification and it is recognized by the witness as the picture of the man he saw on the boat. This party got off at Manzanillo. I should think Manzanillo is over one thousand miles from San Pedro. It took us seventeen days to make the trip. This man had on a palm beach suit, you know one of those light suits, not white. I have been around the work five or six times, many many years.

Redirect Examination.

Mr. KEENAN.—If Mr. Langhorne had furnished me a photograph of the American passengers on that trip I think I probably would recognize them after consideration. The other passengers did not talk as much with me as this man. [338]

Deposition of K. Hansen, for Defendants.

Thereupon, the defendants called as a witness in their behalf K. HANSEN, who, being duly sworn testified as follows by deposition taken at San (Deposition of K. Hansen.)

Francisco, California, on stipulation of all parties to the action, at the taking of which deposition plaintiff was represented by Maurice A. Langhorne, Esq., and the defendants by S. A. Keenan, Esq.:

I was first officer on the "boat Mazatlan," I remember the voyage when we left San Francisco last April or May. I was first officer on the boat, my age is forty-one years, we carried passengers on that trip. Witness is shown Defendant's Exhibit "A." We had a passenger on that trip which this appears to be a picture. He was about five feet ten inches or something like that. He was slim. He looks younger in this picture than he really was when I saw him. The man I saw had a narrower face than this fellow. Witness is shown Defendant's Exhibit "B." This does not look as much like him as the other, I suppose I met him more face to face. His hair was wavy, it was something like mine, brown, it was light brown. I think this man got on the boat at Ensenada. It was the beginning of the journey. He got off at Manzanillo. This man ate at the table with me. I did not see him much aside from seeing him at the table.

Cross-examination.

Mr. LANGHORNE.—I was born in Norway, April 26, 1880, came to this country in 1900, was naturalized in Oakland in 1907. I had been following the water since I was fourteen years old. I was on this particular ship about ten months

(Deposition of K. Hansen.)

plying between San Francisco and Mexican ports. I do not know when we left San Francisco except that it was the first part of April, I will not swear that the man who was on board ship that I have been testifying about is the man shown in this photograph. [339]

Redirect Examination.

Mr. KEENAN.—I would not say that that picture is of that man, but it resembles him, the picture looks exactly like it should be him, I could not swear it is the same man, it is impossible. maybe two men look just alike.

Deposition of Captain F. C. Meyer, for Defendants.

Thereupon the defendants called as a witness in their behalf CAPTAIN F. C. MEYER, who, being duly sworn testified as follows by deposition taken at San Francisco, California, on stipulation of all parties to the action, at the taking of which deposition plaintiff was represented by Maurice A. Langhorne, Esq., and the defendants by S. A. Keenan, Esq.:

I am a sea captain, my age is thirty-five. I was captain in charge of the motorship "Mazatlan." She sailed from San Francisco the fore part of April, about I think April 5. Usually it takes from three and a half to four days to go from San Francisco to Ensenada. Witness is now shown Defendant's Exhibit "A" and states, it appears to be a likeness or a picture of a passenger on that trip. I further testify that Defendant's

(Deposition of Captain F. C. Meyer.)

Exhibit "B" appears more as the likeness of the man than Exhibit "A." The man I saw was not as young looking as this picture, Exhibit "A." His face was not filled out as much. I do not know whether his hair would be blonde or red or whatever he would call it, light anyway. His hair was not black. I should say he had long hair well combed. It was not combed as indicated in this picture, Exhibit "B," this hair appears dark. I should judge it probably was a little longer than that. I conversed with this man. I remember one occasion and maybe more during a little card game we played just before dinner bell one day he invited me to his cabin to have a drink. He did not talk much. As far as I can recall he came aboard at Ensenada, I lost track of him at La Paz. [340]

Cross-examination.

Mr. LANGHORNE.—I first saw this photograph last June, some part of June. I could not give you the exact dates without looking up my log, there should be a record in Los Angeles of the California Mexican Steamship Company in the Pacific Electric Building. Every passenger who took passage was required to register. I do not know the name of this passenger I have referred to. I can give you a description of five American passengers on that boat that I can never forget about. Sometimes I was not more than five feet away from him. I believe we had a few games of Penny Ante with this man around a small deal table. The man's appear-

(Deposition F. C. Meyer.)

ance was kind of attractive. I did not notice whether he had any front teeth missing. I would not swear positively that the photographs Exhibits "A" and "B" are the photographs of the man on my ship. I did not notice anything out of the ordinary about this man's teeth.

Redirect Examination.

Mr. KEENAN.—These photographs are likenesses of a man that was on that ship, but I will not swear that that was the man, the photograph of the man that was on the ship. "What I mean to say is this: When I saw this photograph for the first time in June, last year, I immediately saw that I had seen a man of that description somewhere and by refreshing my memory I found that man had been a passenger on the ship, a man answering this description; now, whether this man, whether the man that this photograph represents is the man, the same man or not, I do not swear to that." This man was about six feet more or less, his build was slender, he would weigh about 175 pounds.

Deposition of Walter H. Comber, for Defendants.

Thereupon, the defendants called as a witness in their behalf WALTER H. COMBER, who, being duly sworn testified as follows, by deposition taken at Riverside, California, on [341] stipulation of all parties to the action, at the taking of which deposition plaintiff was represented by Maurice A. Langhorne, Esq., and the defendants by S. A. Keenan, Esq.:

My name is Walter H. Comber; am thirty-five years old; am married; for three years I have lived at 824 Sheridan Street, Corona, California, about fourteen miles from Riverside. I lived in Washington twenty years, in Seattle and Tacoma. When living there I knew Stewart the banker at Kelso. I met him first in 1913 or 1914, while running an automobile to Mt. Rainier I took him up there as a passenger. He sat with me on the driver's seat and talked with me on the trip to Mt. Rainier. On August, 1921, I saw him standing on the corner of Colorado and Marengo Streets in Pasadena, California. I was riding in an automobile on the street, I came within ten feet of him. As I approached his face was towards me. He had on a gray suit and a gray cap. He had on glasses at that time, dark rims, nose glasses. I saw him two or three days later on Colorado Street at the intersection of Colorado and Broadway, he came around the corner and we both met on the corner practically. I passed him facing him, almost touching one another. We did not speak, he looked at me and I looked at him. He had on a gray suit and a soft hat, it was a soft gray hat. Witness is shown Defendant's Exhibit, Riverside, No. 1, and states: that it appears to be a picture of Frederick Leroy Stewart. The witness is now shown Defendant's Exhibit, Riverside No. 2, and states, that is more of a picture of him to-day than the other. No. 1. is too full in the face for his appearance now, in that picture No. 1, the face is too full. His face

comes in to a point at the chin. This picture, No. 2, is more the appearance of him to-day. From the automobile, the only reason I looked at him was that I knew him the minute I [342] saw him. When I met him on the sidewalk, I noticed the peculiar walk, a very erect walk. He seemed to walk as though he had some injury to his back or his leg, that makes him walk carrying his heels down first and his shoulders straight back. It is a walk out of the ordinary. He carried his head kind of back. Both photographs offered and received in evidence without objection.

Cross-examination.

I was born in Ireland. I came to this country when I was sixteen years old and I landed at Victoria, B. C. I went from there to Seattle. I remained in Seattle until 1914 when I went to Tacoma. I was in the automobile work while living in Seattle. I worked for the Seattle Taxicab Company for about two years. I also worked for the Commercial Importing Company. I also worked for the Pike Street Market. When in Seattle I lived on Queen Ann Hill. I can't give you the number of the house. It was on 8th and Wheeler. I lived there two years. I also lived at Green Lake. I can't give you the number of the house. I cannot even remember the name of the street. I also lived in the Volney Hotel while in Seattle. While in Tacoma I lived on South "J" Street with a man by the name of George Bennett. I lived there three months. I cannot give you the number of the house.

I went back from Tacoma to Seattle in the spring of 1914. I remained in Seattle until 1918. After I went back to Seattle from Tacoma I was driving my own car. When I left Seattle I went to California and located in Venice. I lived there two or three days and then went to Pasadena where I lived for six or eight months. I next located at Riverside and lived there from September 9th [343] until January 17, 1922. I am now living at Corona.

The first time I saw Fred Stewart was on the stage run, when I was running an automobile from Seattle to Rainier National Park. This was some time in 1914 between June and the latter part of September. At that time there was a woman with him. I know it was Fred Stewart because he registered and he also told me his name. I met him several times thereafter in Seattle. I couldn't say how long it was after I drove him up to Rainier National Park until I next met him.

- Q. You started to say something about seeing a photograph a while ago. Can you tell me when you first saw that photograph that was marked Riverside Exhibit 1?
 - A. When I first saw this photograph?
 - Q. Yes.
- A. That is the picture that I first saw in Mr. Wilton's hand.
 - Q. Do you know Mr. Wilton? A. No.
- Q. Where were you when he showed you that photograph.

- A. Mr. Wilton did not show me the photograph.
- Q. I thought you said you saw it in his hand.
- A. I did but he was not showing it to me.
- Q. Who was he showing it to?
- A. He was showing it to another man. Who he was I don't know.
 - Q. Where? A. Riverside.
 - Q. And you came along?
 - A. It was right at my office in Riverside.
 - Q. And you immediately spoke up did you?
 - A. I did. [344]
 - Q. You said you had seen that man?
 - A. I said I knew that man.
- Q. When was this that Mr. Wilton was at your place of business at Riverside with the photograph.
 - A. I think it was October of last year.
 - Q. What did you say to Mr. Wilton?
 - A. Mr. Wilton came to my place to hire a car.
 - Q. Who is Mr. Wilton?
 - A. That is the man sitting there.
- Q. What connection has he with the Prudential Life Insurance Company?
- A. I think that he is an inspector, if I am not mistaken. I have found it out since.
 - Q. Go ahead and tell what took place.
- A. Mr. Wilton came to my place to hire a car to go to March Field and I rented him a car. He drove to March Field and when he came back I was standing in the doorway and he brought this man in with him from March Field that he went out for and they were in conversation and Mr. Wilton

(Deposition of Walter H. Comber.) took the picture out of his pocket and I turned around and says, "I know that man."

I should judge it was around the latter part of August of last year (1921) when I saw Mr. Stewart on the street in Pasadena. He was not disguised. He looked natural. I didn't speak to him. The first time I was in the car but when he came up again and passed me I had gotten by him before I thought of speaking to him. He looked at me and I looked at him. It would have been the natural thing to have spoken to him. We were friendly. There was no reason why I should not have spoken to him. [345]

Testimony of Charles B. Dill, for Defendants.

Thereupon the defendants called as a witness in their behalf CHARLES B. DILL, who, being duly sworn testified as follows:

My name is Charles B. Dill; I am forty years old. I reside in Kelso; have lived there fourteen months. I came to Kelso the 8th of February and Stewart disappeared the 17th of March. I knew Mr. Stewart five years before I came to Kelso. Witness is now shown Defendant's Exhibit "C," annexed to the Hanford depositions, also Exhibit "D," annexed to the same depositions. Witness states that the same are pictures of Mr. Stewart, Exhibit "D" is the better picture. I think Exhibit "D" is a more recent picture of Stewart than Exhibit "C," Exhibit "D" represents Stewart about the time he disappeared, it looks just as he

(Testimony of Charles B. Dill.)

looked about the time he left. After I went to Kelso I saw him every day practically two or three times a day. Before I went to Kelso I probably saw him something like once a month.

Cross-examination.

Mr. LANGHORNE.—If I had never seen Stewart in my life I would say that these two pictures were made of the same man. I would say that Exhibit "D" is a good picture of Stewart as I saw him in March of last year. His hair as shown in this picture looks about as it did when he went away, the style of it.

Testimony of Thomas McDermott, for Defendants.

Thereupon, the defendants called as a witness in their behalf THOMAS McDERMOTT, who, being duly sworn, testified as follows:

My name is Thomas McDermott, I am seventyone years old. I [346] have lived in Kelso
thirty-two years. I knew Stewart all the time I
lived in Kelso, I was intimate with him in a business
way. I would see him daily when I was in town.
When I would meet him in the street, I would
always speak. I saw him just a day or two before
he disappeared. I used to be in business in Kelso.
I think I would be able to recognize a picture of
him. Witness is shown Defendant's Exhibit "C,"
annexed to the Hanford depositions and he states,
that this is a picture of Stewart. Witness is shown
Defendant's Exhibit "D," annexed to the Hanford
depositions and states, that is also a picture of

· (Testimony of Thomas McDermott.)

Mr. Stewart. They both look like him. I know I would recognize either of them as a picture of him. The photographs annexed to the Hanford depositions were received and offered in evidence without objection. Defendant's Exhibits "C," "D," "E," "F," "H" and "I," were offered and received in evidence without objection. Defendant's Exhibit "G" is also offered and received in evidence without objection. [347]

Testimony of George Herbert Raleigh, for Defendants.

Thereupon, the defendants called as a witness in their behalf GEORGE HERBERT RALEIGH, who being duly sworn testified as follows:

My name is George Herbert Raleigh; I am fortysix years of age. I am a banker and manager of the Bank of California at Tacoma. I have lived in Tacoma thirty-one years. I came here in response to a subpoena. I knew Frederick L. Stewart when he lived in Kelso. I knew him ten years. Would see him once or twice a year. I saw him within a year prior to March 1921. I believe I would be able to recognize a picture of him. There was nothing peculiar about his mouth or his teeth that I recall to attract attention. Witness is now shown Defendant's Exhibit "Q" annexed to the San Francisco depositions. It was offered and received in evidence without objection. I would say Exhibit "Q" is a photograph of Stewart, when he left he was a little older than this picture shows.

(Testimony of George Herbert Raleigh.)

Witness is now shown the other photograph annexed to the California depositions, in a smaller figure and he states, this is more like I remember him, that is more nearly like I remember him. This photograph is designated Exhibit "R" offered and received in evidence without objection.

Testimony of Harry E. Moores, for Defendants.

Thereupon, the defendants called as a witness on their behalf HARRY E. MOORES, who, being duly sworn testified as follows:

I have lived in Seattle; I am fifty-three years old. I am connected with the Consolidated Railroad ticket office at Seattle. My duties are to look after the traveling public and give them information on trips to any points in the United States and steamship trips and so on. I have been in this business thirty-five years. I had charge of the same department at Seattle during the war. I am the final authority on all information concerning routes and time and trips in my office. At your request I have looked up the train schedules of all trains running between [348] Manzanillo and lower California and Los Angeles, for the months of March and April, 1921. There is railroad communication between Manzanillo, Mexico and El Paso and Los Angeles. If a passenger had left Manzanillo on April 20, 1921, he would have reached Los Angeles in four days and sixteen hours. I have the official guide with me that is used by every railroad and every ticket man in the country.

Cross-examination.

Mr. LANGHORNE.—From Manzanillo to El Paso is between fifteen to sixteen hundred miles. They are making this run now in four days easily.

Testimony of S. A. Keenan, for Defendants.

Thereupon, defendants called as a witness in their behalf S. A. KEENAN, who, being duly sworn, testified as follows:

I am the attorney for the Prudential Life Insurance Company in this case. I have been practicing law in Seattle for fifteen years. Defendant's Exhibit "X," is a photographic copy of a part of the record of the California Mexico Steamship Company shown to witness. At the time Mr. Langhorne and I were in California taking these depositions which have been introduced in evidence here, we called at the office of the California Mexico Steamship Company in Los Angeles and saw the record of the steamer "Mazatlan." I examined it and made notes from it. I had that photograph taken, I ordered that after I left there.

Q. "Showing you this photographic copy which purports to be a photographic copy of the voyage of the steamer "Mazatlan" together with the time of arrival and departure of the boat at the various places on a trip in April, what can you say as to whether or not that photograph is a true and accurate statement of what that log-book itself shows and if that is [349] a true and accurate copy of the book?

A. It is of the part so far as it concerns this

vessel, because that is the only part I examined at the time."

Photograph offered in evidence.

Mr. LANGHORNE.—I object to it as not properly identified. The man that took the photographic copy is not here to identify it.

The COURT.—You carefully examined it, the log, yourself, before you had the photograph taken?

The WITNESS.—Yes, your Honor, and Mr. McMillan, the manager of the steamship company, had his assistant go and get these records, and the very first question that Mr. Langhorne asked was when that boat left San Francisco and we got that information, and then he asked when it got to San Pedro and he gave the same dates that are given there, and then Mr. McMillan turned the whole thing over to us and said "Make all the notes you want from the record."

The COURT.—From the notes you made when you examined the log you check up on this photograph?

The WITNESS.—Yes, your Honor.

The COURT.—Objection overruled. It will be admitted. Photograph referred to admitted in evidence and marked Defendant's Exhibit "X."

Cross-examination.

(Mr. LANGHORNE.)

Q. Why didn't you take the deposition of the man? A. At the time we were down there?

Q. Yes, sir.

A. Mr. Langhorne, you know as well as I do we

didn't know whether we could get these records or not. [350]

- Q. You found it, didn't you?
- A. We found it, yes.
- Q. Do you mean to tell the Court that I ever saw that record?
- A. I don't even intimate you saw that record at the time.
- Q. When we went down to California we had an open stipulation to take the deposition of anyone you wanted to take?
 - A. At your solicitation, yes.
- Q. I told you you could take the deposition of anybody you wanted to take without notice?
- A. Yes. You asked me, Do I want to testify that you ever saw that record?
 - Q. Yes.
- A. I say you saw that record as well as any other record, because it was there on the table with all the other records.
- Q. We asked for the passenger list, didn't we, when we went in the office? A. Yes.
 - Q. You couldn't find the passenger list?
 - A. That is true.
- Q. And he had a copy of the passenger list there and you took a copy of it and I took a copy of it; isn't that true?
- A. I didn't take a copy of all the passenger list. I took a copy of the American passengers. I guess that is all you did.

- Q. I took a copy of all of them. We looked over the steamship tickets— A. Yes.
- Q. to see if we could find any handwriting that resembled the handwriting you wanted to find?
- A. That is what I was looking for and I guess you were looking for, too. [351]
 - Q. I never saw that log-book or never heard of it.
 - A. I can't help it. I have got it in my notes.
 - Q. Do you claim I saw it while I was there?
- A. I don't know whether you did or not. You could see that as well as you could see the tickets if you wanted to see it.
- Q. You don't mean to tell the Court that I saw that log-book there?
- A. I don't mean to say you saw the tickets. I don't mean to say you saw the passenger list. The fact is I was not watching all the things you did.

Redirect Examination.

Mr. RUPP.—These are the records that were out on the table. We wished to see when the boat arrived at Manzanillo and when it left San Francisco. In other words this man went to Manzanillo got off and tracked back to the United States. He got to Manzanillo April 20. It shows even the hour of the arrival. He left San Francisco on the first and got there on the twentieth of April.

Mr. RUPP.—It shows it got in at 6:45 A. M. April 20, and left at one P. M. April 20, and it has a time here for all these other ports named at the

top showing the date and the time of arrival and the time of sailing.

The captain did not have any records before him when he testified to the 24th. His testimony is clear that the records were all with the steamship company in Los Angeles. He had to guess at the date.

Mr. KEENAN.—If the Court please, that is our case entirely, with the exception of two witnesses that we expect to have here to testify as to the accuracy of those photographs [352] of Mr. Stewart, and I imagine it would be a little cumulative just now, and if they dispute that we would like the privilege of putting on two more witnesses sometime before the case is closed in regard to these being good photographs of Stewart at the time he left.

The COURT.—Well, I don't understand just what you are asking to reserve. That is the testimony of the photographer or—

Mr. KEENAN.—No; we will want to call two more persons to identify those photographs as being likenesses of Stewart at the time he left."

(Defendants rest.)

REBUTTAL TESTIMONY.

Testimony of Everett Smith, for Plaintiff (In Rebuttal).

EVERETT SMITH, being first duly sworn, testified on behalf of plaintiff as follows:

My name is Everett Smith. I am one of the

(Testimony of Everett Smith.)

Judges of the Superior Court of King County, Washington. I have known Walter H. Comber since the 6th day of May, 1906. I was in court on the morning of that day and he was arraigned before one of the Judges, charged with burglary, to which he pled guilty. He was then between sixteen and seventeen years old. The Judge before whom he was sentenced did not know what to do with him and made the remark that if anyone there was willing to take the boy, take charge of him, he would not send him to a penal institution. I volunteered to take charge of him and did so and he has been on my hands more or less ever since. I was intimately acquainted with him. I suppose I did more for him than anybody else outside of his own family. I am acquainted with his general reputation for truth and veracity in the city of Seattle. It is bad. [353]

Cross-examination.

(Mr. KEENAN.)

There were some circumstances which mitigated the appearance of the case very much. The boy had been discharged by his employer and was out of money and out of work and he went back to the store and said he was going to get what was due him, and he either took money or merchandise to the limit of the amount which he claimed was due him from his employer. That fact in itself has not influenced me. I have known him intimately since that time for sixteen years and have done a great deal for him. His veracity is incredible.

(Testimony of Edwin C. Ewing.)

Mr. LANGHORNE.—I now offer in evidence an exemplified copy of an information and judgment in cause No. 3647 entitled State of Washington vs. Harry Comber, wherein the Superior Court of King County sentenced him to three years in the State Penitentiary for burglary.

Document referred to admitted in evidence and marked plaintiff's Exhibit 32.

Testimony of Edwin C. Ewing, for Plaintiff (In Rebuttal).

EDWIN C. EWING, called as a witness in rebuttal for plaintiff, being duly sworn, testified as follows:

(Mr. LANGHORNE.)

My name is Edwin C. Ewing. I live in Seattle. I am Assistant Corporation Counsel of that city. I have lived there for twenty years. I am acquainted with Walter Comber who formerly worked in Pike Street Meat Market. I am acquainted with his general reputation for truth and veracity. It is bad.

Testimony of C. F. Riddell, for Plaintiff (In Rebuttal).

C. F. RIDDELL, called as a witness in rebuttal for [354] plaintiff, being sworn, testified as follows:

(Mr. LANGHORNE.)

My name is C. F. Riddell. I live in Seattle. I have been Assistant United States Attorney and United States Attorney. I am acquainted with

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(Testimony of C. F. Riddell.)

Walter Comber. I first knew him in 1913. I am acquainted with his general reputation for truth and veracity in the city of Seattle. It is bad.

Cross-examination.

'(Mr. KEENAN.)

Mr. Ewing and myself were interested in a lawsuit in which Comber was incidentally connected. My acquaintance with him began before the lawsuit began. I knew of him off and on until the time he left for California.

Testimony of F. W. Taggart, for Plaintiff (In Rebuttal).

F. W. TAGGART, called as a witness in rebuttal for plaintiff, being first duly sworn, testified as follows:

(Mr. LANGHORNE.)

My name is F. W. Taggart. I reside in Seattle. I have lived there for twenty years. I was connected with the Seattle Taxicab Company for about four years. I knew Walter Comber both while I was manager of that company and prior thereto as well. He was at one time in the employ of the Seattle Taxicab Company. I am acquainted with his general reputation in the city of Seattle for truth and veracity. It is worthless.

Cross-examination.

Mr. KEENAN.—You and he had trouble, I expect.

A. No, sir. Not any more trouble than you have

(Testimony of F. W. Taggart.)

with any one that you was trying to do something for and he wouldn't [355] let you.

Q. His services were perfectly satisfactory, were they? A. Very unsatisfactory, sir.

Testimony of Harry H. Cline, for Plaintiff (In Rebuttal).

HARRY H. CLINE, called as a witness in rebuttal for plaintiff, being sworn, testified as follows: (Mr. LANGHORNE.)

My name is Harry H. Cline. I live at 4808 North Mullen Street, Tacoma. I have lived in Tacoma since January 1, 1917. I am an engineer by profession. I have been acquainted with Walter Comber since 1911, I think. I am acquainted with his general reputation for truth and veracity in Tacoma. It is bad.

Cross-examination.

(Mr. RUPP.)

I don't know just how long Comber did live in Tacoma. I guess three or four months. I am not sure. I have lived here since Jaunary 1, 1917. I lived in Seattle prior to that time.

Testimony of L. O. Barnard, for Plaintiff (In Rebuttal).

L. O. BARNARD, called as a witness in rebuttal for plaintiff, being sworn, testified as follows:
(Mr. LANGHORNE.)

My name is L. O. Barnard. I have lived in Seattle for about seven years. Before moving to Seattle

(Testimony of L. O. Barnard.)

I lived in Kelso for thirteen years. I am a dentist by profession. I was acquainted with Fred L. Stewart when I lived in Kelso. I did dental work for him at that place. His upper teeth were all gold crowns, that is, with the exception of bridgework, [356] with the exception of three anterior teeth, two centrals and a lateral. The laterals—the left lateral had a white crown on. The two centrals were his natural teeth. The balance of them were gold crowns. The bicuspids and the front teeth were exceptionally long. Mr. Stewart had a medium sized mouth but his lips were very thin. When he was talking or laughing or even in an ordinary conversation the first thing you would notice about him would be his teeth.

Q. Do you suppose, Doctor, from your knowledge of Fred Stewart's teeth and his mouth and the peculiarities that you have described that a person could be with him for seventeen days, sit at the same table and eat with him, drink with him and play poker with him around a small deal table, and not notice those teeth? A. Absolutely not.

Cross-examination.

(Mr. KEENAN.)

The last work I did for him was six or eight years ago. I have seen him probably three or four times since. His two central teeth were natural. The other teeth had gold crowns on. There was more gold in his teeth than you ordinarily find in men who have poor teeth.

(Testimony of L. O. Barnard.)

The photograph you show me looks like Stewart the last time I saw him. Exhibit "C" is a picture of Stewart. It resembles him as far the photograph goes. I should judge Exhibit "D" is also a photograph of Stewart. I would consider it a very good photograph.

Redirect Examination.

(Mr. LANGHORNE.)

I think it was about three years ago that I last [357] saw Stewart. I saw him in a drug-store at Kelso. He had his hat on.

Testimony of George M. Campbell, for Plaintiff (In Rebuttal).

GEORGE M. CAMPBELL, called as a witness in rebuttal for plaintiff, being sworn, testified as follows:

(Mr LANGHORNE.)

My name is George M. Campbell. I live at Kalama. I am cashier of the Kalama State Bank. I am acquainted with Captain John Reid. On the night of March 17th last I was at Dr. Sims' residence. About nine o'clock that night sheriff Hogett who was there received a telephone call from Captain Reid and Sheriff Hogett and myself immediately left Dr. Sims' residence. I went down to the dock where the boats land. The light at the top of the slip was burning. I was in the barbershop of Mr. Taylor in Kalama on May 5th or 6th of 1921. It was about the 5th I guess. I saw George Elwood there that day. He is in the court-

(Testimony of George M. Campbell.)

room now. While in there Elwood stated that he was in Hanford, California, on February 22, 1921. He said he knew it was February 22d because it was Washington's birthday. He said while in a barbershop he saw two persons come out of a restaurant and that he thought one of them was Fred Stewart. I then told him that Fred Stewart did not disappear until the night of March 17, 1921, and Elwood then said that he might be mistaken in the man.

Cross-examination.

(Mr. RUPP.)

The time was about 3:15 in the afternoon when I went into Taylor's barber-shop. We close the bank at three [358] o'clock. I went there for the purpose of getting shaved. At the time of the conversation with Elwood I had not been in the barber's chair. The conversation there in the shop was between Mr. Elwood and myself. He placed the time about ten weeks prior to May 5th as the time when he had seen Stewart, and then I asked him what made him so sure it was ten weeks and he said, to be specific, it was on the 22d day of February, or Washington's birthday.

The lights on the slip at Kalama I think are the same now as they were on March 17th. I see the slip every day. When I got down to the slip that night Captain Reid was the only man there was there at that time. I left the sheriff behind. He was too slow for me.

Testimony of Lawrence Perry, for Plaintiff (In Rebuttal).

LAWRENCE PERRY, called as a witness in rebuttal for plaintiff, being sworn, testified as follows:

(Mr. LANGHORNE.)

My name is Lawrence Perry. I am now living at Kelso. I lived in Kalama from January, 1913, until September 1918. I was County Clerk for four years and County Treasurer about twenty-one months. I am acquainted with John Reid. I was in Kalama a day or two after Stewart's disappearance. I talked with Mr. Reid at the depot at that time. Reid told me "Stewart is in the river." In telling me who got off the boat he said that the three loggers, Chisholm and the drummer came up the slip and that Stewart did not.

I have seen George Elwood. I met him at the dock at Kalama in the early part of May of last year. I can't recall the date but it was the day he arrived at Kalama. I heard a conversation between Elwood and William Pomeroy and Paul G. Shotswell. I heard Elwood tell Shotswell and Pomeroy [359] that he was not absolutely positive nor was he certain that it was Stewart.

Cross-examination.

(Mr. RUPP.)

I am now in the insurance and real estate business. I was County Treasurer for twenty-one months. I quit before the term was over. I resigned some-

(Testimony of Lawrence Perry.)

what under fire. It was a political proposition.

The COURT.—What were you accused of?

The WITNESS.—Nothing, only the commissioners insisted on raising my bond. I had some divorce trouble with my wife and I guess they figured I was not a safe proposition.

Testimony of Russell Carothers, for Plaintiff (In Rebuttal).

RUSSELL CAROTHERS, called as a witness in rebuttal for plaintiff, being sworn, testified as fellows:

(Mr. LANGHORNE.)

My name is Russell Carothers. I live in Kelse, Washington. I am acquainted with Mr. Elwood. I saw him in Kelso on or about the sixth or seventh of May of 1921. He was in Hunt's barber-shop. I heard him say something about having seen Fred Stewart in Hanford, California. I asked him to sign an affidavit to that effect and he replied, "No," he would not sign any affidavit because he might be mistaken in the man.

I went down to Kalama on March 17, 1921, the night of Stewart's disappearance. I must have arrived there by 10:30. There was light sufficient enough at the top of the slip for me to recognize people. [360]

Cross-examination.

(Mr. RUPP.)

My father was president of the bank when Stewart disappeared. He is not in Kelso now. He has (Testimony of Russell Carothers.)

gone down to southern California. He left on the 6th of last month. He didn't tell me not to write to him. The last time I heard he said he would be here approximately two weeks. He is down there on account of my mother's health. I will correct myself in one particular. He told me not to write until I heard from him because they were going from one town to another.

I am acquainted with the surroundings at the depot in Kalama. It is well lighted there on the platform. I don't know who the lights are put up there by. I couldn't say whether it would be well lighted if the upper light at the slip was out at night.

Testimony of F. A. Byrd, for Plaintiff (Recalled in Rebuttal).

F. A. BYRD, produced as a witness on behalf of the plaintiff, being recalled in rebuttal, testified as follows:

(Mr. LANGHORNE.)

I am acquainted with George Elwood. I met him shortly after I came to Washington in 1904. I met him in Olympia about the 13th or 14th of last May. At that time I had read reports in the newspapers about Mr. Elwood having seen Mr. Stewart in southern California. I had a conversation with Elwood in the Olympia Hotel on the 13th or 14th of May concerning the report that he had seen Stewart in Southern California. During that conversation he told me that he saw some person in

(Testimony of F. A. Byrd.)

Hanford that he took to be Fred Stewart but that he did not speak to him and that he would not swear [361] it was Stewart he saw.

Cross-examination.

(Mr. RUPP.)

I heard Elwood say on yesterday that he told me that if it were not Stewart, his wife would be inclined to walk off with him. He did not say that to me.

Testimony of Grover Thornton, for Plaintiff (In Rebuttal).

GROVER THORNTON, called as a witness in rebuttal for plaintiff, being sworn, testified as follows:

(Mr. LANGHORNE.)

My name is Grover L. Thornton. I live at Kelso. I knew Fred Stewart. I went down to Kelso on the night of the 17th of March, 1921. After arriving there I met Captain Reid. I had a conversation with him that night. He told me that there were five men got off the boat. He also told me that Fred Stewart did not get off the boat. I asked him if it was possible for Fred to have gotten off disguised and he said absolutely there was no chance. There was plenty of light there on the slip that night.

Cross-examination.

(Mr. RUPP.)

The conversation between Reid and I took place on the slip. We were coming up from the boat at the time. I had not met Reid before that night. (Testimony of J. W. Hogett.)

I have met him since. That was the only conversation I ever had with him.

Testimony of J. W. Hogett, for Plaintiff (Recalled in Rebuttal).

J. W. HOGETT, produced as a witness on behalf of the plaintiff, being recalled in rebuttal, testified as follows: [362]

(Mr. LANGHORNE.)

My name is J. W. Hogett. I am sheriff of Cowlitz Coutny, Washington. I had a conversation with John Reid on the 14th day of March, 1922, at the depot at Kalama. In that conversation he told me that he was going to swear that he saw Fred Stewart alive on the night of March 17, 1921. I then said to him, "I would be afraid to make that statement." He replied by saying, "I am not under oath. I can say anything."

I was down at the slip the night of Stewart's disappearance. I am not positive that the light at the head of the slip was burning but it was well lighted there. I should imagine it would be quite dark if that light was off unless the train is coming in. When the trains are coming in the railroad switches on lights there. There was light enough there when I got down there that night.

Cross-examination.

(Mr. RUPP.)

I went down there that night to find out if Stewart was drowned or not, to see if he had come off the boat or whether he was drowned. That was my duty there.

Testimony of Edward White, for Plaintiff (In Rebuttal)

EDWARD WHITE, called as witness in rebuttal for plaintiff, being sworn testified as follows: (Mr. LANGHORNE.)

My name is Edward White. I have lived in Kalama for between eight and ten years. I worked at the sheriff's office the last two years. I was in Kalama the night Fred Stewart disappeared off the boat. I heard of the disappearance the next morning. I talked with Captain John [363] Reid about Stewart's disappearance the day following his disappearance or the day after. In that conversation Reid told me that five passengers got off the boat, consisting of the three loggers, Chisholm and the drummer. I assisted in the search for Stewart's body, Captain Reid pointed out places to me in the river where I should search.

Cross-examination.

(Mr. RUPP.)

As to my present occupation I have a ranch and I worked around at different things. The last thing I done was working on the contract for the Port of Kalama. That was in January and February. I worked on the dock of the port until last Thursday.

Testimony of William Stuart, for Plaintiff (Recalled in Rebuttal).

WILLIAM STUART, witness for the plaintiff, being recalled in rebuttal, testified as follows:

I am acquainted with John Reid. I interviewed Mr. Reid in Kalama, Washington, in the early part of August of last year. There had been considerable pressure brought upon me by Mr. Wilton, the insurance man, to get me to file an information against Mr. Stewart. When I interviewed Mr. Reid he told me that it would be impossible for Mr. Stewart to get off that boat without him seeing him. He said he stood on the dock there and there was a bright light burning and he said there were five passengers got off the boat but that Fred Stewart never got off.

Cross-examination.

(Mr. KEENAN.)

I talked with one or two of the other men on the [364] boat. I think I talked with Mr. Shotswell. I am not sure but I talked with one or two of the other boatmen prior to the time I talked with Mr. Reid. The day I interviewed Captain Reid I talked with no one else with regard to the matter. There was not very much of an investigation we could make. The supposition was that Stewart was in the river. There was an administrator appointed for his estate. I did not come to the conclusion that because an administrator had been appointed it was "judicially found that he was dead." I have always been of the opinion that

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(Testimony of William Stuart.)

Mr. Stewart committed suicide. That has been my personal opinion of course and I wanted something very definite before I would take any action in the matter.

Q. I will ask you again, didn't you tell him (Wilton) well, they have appointed an administrator and of course the Court found he was dead and "I don't think I will."

A. Yes, I presume I told him that. We had several conversations. He came to see me several times while he was in Kelso. I think he was in Kelso more than once.

I think I talked to Pomerov, and maybe Shotswell. I am not certain about that. I don't know how many men Reid had working for him at that There are two ferries there at Kalama. think Pomerov had been working for Mr. Reid for some time. I know that Reid was not in charge of the "Queen" on the night of Stewart's disappearance. He told me he stayed on the dock. I am not criticising Mr. Reid for not wanting to get mixed up in this suit. He told me the report that Stewart was out or got away was all nonsense or bunk. I didn't ask him the names of the passengers that came off the boat. He did not give me the number of passengers that [365] went aboard at Goble. He said it would be impossible for anyone to get off the boat without him seeing him.

Testimony of W. S. Carson, for Plaintiff (In Rebuttal).

W. S. CARSON, called as witness in rebuttal for plaintiff, being sworn, testified as follows: (Mr. LANGHORNE.)

My name is W. S. Carson. I have lived in Kalama, Washington, about thirty years. By occupation I am a contractor. I know John Reid. I had conversation with him two or three days after Stewart's disappearance. In that conversation he told me that Stewart could not have got off the boat without his knowledge, that only the three timber cruisers, the drummer and Jack Chisholm got off.

I went out and assisted in the search for Stewart's body. Reid pointed out places to me in the river where I should search. I followed his instructions.

Cross-examination.

(Mr. RUPP.)

I dragged the river for twelve or fourteen days. I quit because I couldn't find the body. I dragged in all the places that I thought it was likely the body would be found.

Testimony of John Hill, for Plaintiff (In Rebuttal).

JOHN HILL, called as a witness in rebuttal for plaintiff, being duly sworn, testified as follows: (Mr. LANGHORNE.)

My name is John Hill. I have lived in Kalama Washington for thirteen years. I am by occupation a barber. I am acquainted with George Elwood.

(Testimony of John Hill.)

He was in my shop in the early part of May of 1921. I told him that a man by the [366] name of Crouch was looking for him and wanted him to sign an affidavit that he (Elwood) saw Stewart in California. Elwood replied by saying that he would not sign an affidavit for any one unless they guaranteed him \$10 per day and all expenses.

Cross-examination.

(Mr. RUPP.)

Elwood also said at the same time that that was about the amount he was making and that it might cover his expenses.

Testimony of Frank J. Sardam, for Plaintiff (Recalled in Rebuttal).

FRANK J. SARDAM, produced as a witness on behalf of the plaintiff, being recalled in rebuttal, testified as follows:

(Mr. LANGHORNE.)

I know George Elwood. I was not acquainted with him before May of last year. I noticed an article in the newspapers purporting to be a statement of Mr. Elwood that he had seen Fred Stewart in southern California. After reading this article I got in communication with Mr. Elwood. I wrote to him at Aberdeen, Washington, c/o the Washington Hotel. The letter that I wrote him was written on the stationary of the Bonneville Hotel. I never wrote him a letter on any stationary of the Travelers Insurance Company. I met Elwood in the city of Tacoma on May 14, 1921. I took him to

(Testimony of Frank J. Sardam.)

your office. Mr. Fitch was with me. While in your office he made this statement: "My name is George Elwood. I live near Ramona, California. I travel for a barber supply house. I once lived in Kelso. Knew Fred Stewart when I lived there. Have been away for several years. I was in Hanford, California, [367] on March 24th. I think that was the date. I was in a barber-shop and looking into a glass on the rear wall, I caught sight of a man going diagonally across the street that I thought was Fred Stewart, I went to the door and called him, but he paid no attention to me. I walked out on the sidewalk and then I thought he didn't want to recognize me. I didn't talk to him. He was some distance away. Of course I am not positive it was Stewart. I would not swear it was I have been mistaken about the identity of persons several times. Not long since I walked up to a lady on the street that I thought I knew and greeted her, but she did not respond, and I took another look and found I was rankly mistaken."

Cross-examination.

(Mr. RUPP.)

I did not sign the letter that I wrote to George Elwood "General Agent." I think I put my card in the envelope and give him my telephone number at the hotel. I think my office telephone number was also printed on the card.

I did not interrogate Mr. Elwood when he was in Mr. Langhorne's office. Mr. Fitch and Mr. Langhorne talked to him.

(Testimony of Frank J. Sardam.)

When Elwood arrived in Tacoma I met him in front of the Travelers Hotel on Pacific Avenue. We went right to Mr. Langhorne's office. Mr. Fitch was with me when I met Elwood. I went to the Travelers Hotel to meet Elwood as he told me he would be there. I guess I told Fitch when we started out that we were going to meet Elwood. I had no reason not to. The telephone number that I enclosed in my letter to Mr. Elwood at Aberdeen was the telephone number of [368] the hotel where I live. I did not put on the card Mr. Langhorne's telephone number.

Testimony of J. H. Binns, for Plaintiff (In Rebuttal).

J. H. BINNS, called as a witness in rebuttal for plaintiff, being first duly sworn, testified as follows: (Mr. LANGHORNE.)

I am a clerk in the office of Hayden, Langhorne & Metzger, attorneys. The two books that now lav before me contain the names of persons entering Rainier National Park during the season of 1914. I have examined these two books so far as they apply to registration during the year 1914. I went over the names one by one. I did that twice. name of F. L. Stewart is not among those registered in these books. There is the name of Fred Stewart of Tacoma. He registered from Tacoma and came in on the Ashford stage. The Ashford stage is the one that connects with the train.

The books referred to admitted in evidence and marked Plaintiff's Exhibit 34 and 35.

(Testimony of J. H. Binns.)

Cross-examination.

(Mr. KEENAN.)

I have never been in the park. On examination of these books I find different names are frequently signed by the same person. It is obvious from examination of the books that the government did not require every individual to sign with his own name. I am not familiar with the handwriting of the lady who it is said accompanied Mr. Stewart, nor do I know who the lady was. There was nothing to prevent her signing her name and the name of the man she was with. I suppose it would be possible for Mr. Stewart to go into the [369] park and his name not appear on the register.

Testimony of Paul G. Shotswell, for Plaintiff (Recalled in Rebuttal).

PAUL G. SHOTSWELL, being recalled on behalf of the plaintiff, testified as follows:

The COURT.—You just tell about what you did in connection with searching the boat that night after landing.

The WITNESS.—Well, sir, when Mr. Reid came down the slip and went on board with Mr. Pomeroy I started walking up the slip and I noticed the drummer going past and I hollered to the drummer and asked him if he seen Mr. Stewart get off the boat and he said he didn't, then he and I went down together and Mr. Pomeroy and Mr. Reid all went through the boat, Mr. Pomeroy using a flashlight. I distinctly remember Mr. Pomeroy

(Testimony of Paul G. Shotswell.)

going into the engine-room and I stood at the top of the steps and watching him, then we all went off the boat then and went up to the depot and notified the sheriff.

The COURT.—Take the three of you together, some of you were all over every part of the boat?

The WITNESS.—The four of us.

The COURT.—The four of you. The drummer was with you?

The WITNESS.—The drummer was with us.

The COURT.—You collected the fare from Stewart?

The WITNESS.—Yes, sir.

The COURT.—Did you have any talk with Stewart either on the boat or before he took the boat, that is over at Goble?

The WITNESS.—Yes. I tried to get in conversation with Mr. Stewart. We talked about the weather. It was raining very hard that night. But he didn't want to talk.

The COURT.—That was before he came on the boat? [370]

The WITNESS.—No. That was while we were in the river and when I gave him his change I thanked him and he replied to it.

The COURT.—That is all.

Cross-examination.

(By Mr. KEENAN.)

Q. No, Captain Pomeroy has just testified that he did not go into the engine-room. Now he is mistaken and you are correct, is he?

(Testimony of Paul G. Shotswell.)

- A. I think you are mistaken.
- Q. You answer my question. If he so testified then he is mistaken and you are correct?
 - A. What is the question?

(Questions and answers read.)

A. He didn't testify he didn't go in the engineroom.

Mr. RUPP.—Make him answer the question that you put to him, assuming that he did.

The WITNESS.—I am not assuming that he did. I know he did not.

Mr. RUPP.—We have a right to make you assume that he did.

The COURT.—The court agrees with the witness on that, he having heard the testimony. The Court remembers that he said he went to the foot of the stairs in the engine room.

The WITNESS.—That is correct.

Mr. RUPP.—Then if that is the case I agree with the Court.

The COURT.—Anything further? The trial will be resumed at eleven o'clock on Monday.

Testimony of Percy T. Brush, for Plaintiff (In Rebuttal).

PERCY T. BRUSH, being called as a witness in rebuttal for plaintiff, being sworn, testified as follows; [371]

(Mr. LANGHORNE.)

My name is Percy T. Brush. I have lived in Tacoma since January 1, 1918. Prior to that time

(Testimony of Percy T. Brush.)

I lived at Kelso from 1908. I knew Fred L. Stewart. I was intimate with him. During the whole time I was in Kelso I was associated with Judge McKenney and we were counsel for the Kelso State Bank during all of that period. For some time I was counsel for that institution while Judge Mc-Kenney was on the bench. I then came in contact with Fred Stewart. The most noticeable thing that I observed about Stewart was the fact that when he talked and smiled and laughed he showed practically all the teeth he had. He had had a great deal of gold work done in his mouth, and as I remember now, the upper teeth on either side of his mouth were crowned with gold. I think as I remember, he had two or three or four of his front teeth were white, his natural teeth were white. On either side and back they were crowned with gold and they could be seen very distinctly when he talked.

The COURT.—You say two, three or four were natural. Do you mean in one jaw or both jaws.

The WITNESS.—I mean his upper front teeth, yes; I think that the four front teeth, if I remember rightly, were white.

The COURT.—Upper?

The WITNESS.—Yes.

Mr. Stewart was very active in the social and business life of Kelso. He was perhaps one of the most leading citizens of that section of the country. He was a very proud and sensitive man, very highstrung.

(Testimony of Percy T. Brush.)

I recognize Defendants' San Diego Exhibit "1." It [372] is a photograph of Fred Stewart as he appeared when I first knew him. The last time I remember seeing Fred Stewart was in the late summer of 1919 or 1920. At that time he did not wear his hair in the style shown in defendants' San Diego Exhibit No. 1.

I recognize Plaintiff's Exhibit No. "36." That is a photograph of Fred Stewart with his little boy and father also shown in the picture. I can't remember the exact date Stewart changed the style of wearing his hair but it was just about the time that I underwent the same transformation myself, which as I recollect, was in 1914.

I know that Mrs. Stewart had a trained nurse in attendance upon her during practically all of the summer of 1914. Our two families were quite intimate in a social way. My wife and Mrs. Stewart were intimate friends. I went to the beach during the latter part of July, 1914, and I know that for some weeks prior to our going Mrs. Stewart had been ill and had the nurse in attendance.

I know Fred L. Stewart's signature. The signature as shown me on Plaintiff's Exhibit "34," page 18, is not his signature.

Photograph, Plaintiff's Exhibit "36" offered and received in evidence.

Cross-examination.

(Mr. KEENAN.)

I left Kelso January 1, 1918. I couldn't say how many times I saw Mr. Stewart after that. I

(Testimony of Percy T. Brush.)

wouldn't undertake to say whether I saw him during the winters of 1920 and 1921. I can't remember. I think I saw him during the [373] summer of 1920. I was in Kelso on one or two occasions during that summer. Prior to the time Stewart started to comb his hair back he parted it, part of the time in the middle and part of the time a little left of the middle. When I started to combing my hair back some of my friends said it changed my appearance. I don't think I met any friends who did not recognize me because I changed the style of wearing my hair. Knowing Stewart as well as I did I would probably have recognized him had he lost all of his hair. I recognize the picture you show me as a picture of Stewart. I would say that my recollection is that when I saw him last he wore different glasses than those shown in the photograph. He looked a little older. His hair was also combed straight back. I don't find any difference in Defendants' San Diego Exhibit No. "1" and in the photograph shown me. As far as I know they are the same picture. I don't think the photograph annexed to the Hanford deposition which shows Stewart sitting in his office is a very good likeness of him, but I recognize him. I wouldn't say, however, that it is a fair likeness of him—not at the time I last saw him. It is a good likeness of him prior to the time he started brushing his hair back. I testified that Stewart was a sensitive man. I would say that his sensitiveness was directed more towards resenting criticism than any(Testimony of Percy T. Brush.) thing else. If he was disagreed with on a matter I think he showed it more quickly than the average man.

When I was counsel for the bank I had a belief that all was not right with that institution. I heard no rumors that the bank would be closed except what was mentioned to me by Mr. Stewart or someone in connection with the bank. [374] Mr. Stewart never told me that he got any severe criticism from the banking department. I never knew that the bank examiner was there to examine the bank except on one occasion and I didn't see Mr. Stewart at that time and consequently I paid very little attention to it.

Testimony of Henry J. Ashbury, for Plaintiff (In Rebuttal).

HENRY J. ASHBURY, called as a witness in rebuttal for plaintiff, being sworn, testified as follows:

(Mr. LANGHORNE.)

My name of Henry J. Ashbury. I live at 1219 South 14th Street, Tacoma. I have lived there for thirty-two years. My occupation is that of a barber. I have been in that business since I was about seventeen years old. I am familiar with the different styles of hair cuts that men wear. I have often cut hair in pompadour style. I recognize Defendants' San Diego Exhibit No. "1." That photograph shows the style in which Mr. Stewart wore his hair when he served in the State Senate. Assuming that

(Testimony of Henry J. Ashbury.)

the man in the photograph (Plaintiff's Exhibit "36") had worn his hair in pompadour style for seven or eight years I don't think, from the thinness of the hair, that he could ever get it back in the style shown in Defendants' San Diego Exhibit "No. 1."

Testimony of Paul G. Shotswell, for Plaintiff (Recalled in Rebuttal).

PAUL G. SHOTSWELL, being recalled in rebuttal on behalf of plaintiff, testified as follows: (Mr. LANGHORNE.)

I never saw Captain Reid or any one else walk around on the three-inch planking on the "Queen" either while the boat was standing still or in motion. The average rate of speed the boat makes when crossing the Columbia River is [375] ten or twelve miles an hour. It depends upon the condition of the river and wind as to whether there is any sway to the boat when it is in motion. I should judge that the boat had a little movement to her under the conditions that prevailed on the night of March 17, 1921.

I know George Elwood. I saw him at Kalama last year. I never saw him there more than once. Pomeroy was present. When Elwood stated the date when he said he had seen Stewart in California, Captain Pomeroy threw up his hands and said, "You are off your trolley." In the same conversation Elwood stated he would not positively

(Testimony of Paul G. Shotswell.) swear that it was Stewart he thought he saw in California.

Cross-examination.

(Mr. KEENAN.)

Captain Reid heard this conversation that I have just testified to. I remember your (Mr. Keenan) being down in Kalama week before last. I had conversation with you at that time. I didn't tell you that I didn't remember any conversation that I had with Elwood.

On the rear platform of the boat there is a hatchway. It is not a way to go into the boat. It is a way to get to adjust your tiller line.

Redirect Examination.

(Mr. LANGHORNE.)

This hatchway is a way we have of adjusting the tiller line. It don't lead anywhere to the forward part of the boat. It leads nowhere. It would be impossible for a man to hide himself in that little place. [376]

Testimony of C. M. Taylor, for Plaintiff (In Rebuttal).

C. M. TAYLOR, called as a witness in rebuttal for plaintiff, being sworn, testified as follows:

My name is C. M. Taylor. I have lived in Kalama for about thirty years. I am forty-four years old. My occupation is that of a barber. I was running a barber shop on May 5th and 6th of 1921.

(Testimony of C. M. Taylor.)

I know George Elwood. I knew who he was when he lived at Kelso but was not personally acquainted with him then. Elwood was in my barber-shop on May 5th or 6th of 1921. While there he stated that he saw Fred Stewart in Hanford, California, on February 22, 1921, and he also stated that he knew that it was that date because it was George Washington's birthday, and that it was a holiday and that he was not compelled to work, and that only the barber-shops and restaurants were open in Hanford on that date. After Elwood stated this Mr. Campbell who was present, informed him that Stewart did not disappear until March 17, 1921, and Elwood then said he was probably mistaken about seeing Fred Stewart in Hanford.

Cross-examination.

(Mr. KEENAN.)

During that conversation I asked Elwood how business was in California. I am not hard of hearing. I heard all the conversation that took place between Elwood and Campbell. I said the conversation was more between Campbell and Elwood than myself, because I was busy. I was cutting a man's hair at the time.

Testimony of A. H. Imus, for Plaintiff (In Rebuttal).

A. H. IMUS called as a witness in rebuttal for [377] plaintiff being sworn, testified as follows: (Mr. LANGHORNE.)

My name is A. H. Imus. I live in Kalama. I

(Testimony of A. H. Imus.)

have lived in Kalama for thirty-three years. My occupation is that of a lawyer. I am one of the attorneys for the plaintiff in this case. I heard the statement of Captain Reid about my trying to induce him to sign an affidavit. What I did say to him was about as follows:

I went down to the dock and met Reid and told him I had just received a letter from Mr. Langhorne asking me to get an affidavit showing the facts and circumstances of Stewart's disappearance and Reid commenced to cus Mr. Langhorne and abused him like everything and said something about political treachery. He seemed to be very sore at Mr. Langhorne and when he got cooled off so I could talk to him again I told him that Mr. Langhorne was not the only attorney in the case and asked him if he would not disregard his feeling toward Mr. Langhorne and make an affidavit of the facts as a personal favor to me. I didn't tell him there would be any money in it and I didn't tell him I wanted him to make an affidavit that Stewart was dead. I explained to him that it was a case of circumstantial evidence and we would have to get the facts and circumstances surrounding Mr. Stewart's disappearance in order to make the proof of loss and we desired the affidavit to submit to the insurance company.

I know Jack Chisholm. He was in my office in May, 1921. I don't remember the exact date. He told me what occurred on the night of March 17th. He said that he had jumped off the boat before it

(Testimony of A. H. Imus.)

had fairly stopped and was probably at the top of the slip before anybody else got off. He said [378] it was a stormy night and he was anxious to get home. He said he noticed Captain Reid at the top of the slip but aside from that he saw nobody, never looked back and hurried home.

Cross-examination.

(Mr. KEENAN.)

The difference between what Chisholm said to me at that time and what he testified to the other day is that he told me he never looked back and never saw anybody after he got off the boat but Captain Reid. I never asked him if he saw Stewart. 1 think Mr. Langhorne did the talking. He said he never looked back from the time he left the boat and never saw anybody on his way home but Captain Reid at the top of the slip. I can't give any reason for his having made such a statement as that excepting to convince us that he saw no person from the time he left the boat besides Captain Reid. After this interview I had with Chisholm I had no further interview with him until about a week before this case was set for trial. At that time Mr. Langhorne was in Kalama and I had Mr. Chisholm come to the office and I explained to him in the presence of Mr. Langhorne, Mr. Fitch and Mrs. Stewart that the case was set for trial on next Tuesday and that it had been such a long time since we had our former talk that we wanted to go over the facts again and refresh our memories (Testimony of A. H. Imus.)

and he (Chisholm) then said "I shall not say anything until I get on the witness-stand."

Redirect Examination

(Mr. LANGHORNE.)

I heard Captain Reid's statement that he had never talked with you (Mr. Langhorne) since this case commenced. I recall the first time you came to Kalama after Mr. Stewart's [379] disappearance. It was some time in May, 1921. I recall seeing Captain Reid, Mr. Fitch and yourself in conversation at the depot. I can't tell how long that conversation lasted as I left you and Mr. Fitch and Captain Reid and walked up to my office with Mr. Sardam. I should judge it was about fifteen minutes before you came up there.

Recross-examination.

(Mr. KEENAN.)

I didn't hear the conversation between Mr. Langhorne and Captain Reid. I didn't pay any attention to the conversation.

I also tried to get an affidavit from Pomeroy in regard to Stewart's disappearance. Mr. Pomeroy told me the facts but he didn't want to give any affidavit but said he would swear on the witness-stand to the facts. He seemed to be a little superstitious about an affidavit.

Mr. LANGHORNE.—In order to avoid calling a witness it will be stipulated between counsel that a person leaving Portland at midnight on the night of the 17th of March, 1921, could not possibly have

(Testimony of G. H. Thayer.)

reached Hanford, California, before 9:20 P. M. on the night of March 19, 1921.

Mr. RUPP.—If he went around by San Francisco he would get in at 8:55 on the evening of the 19th.

Mr. LANGHORNE.—Well, all right.

Testimony of G. H. Thayer, for Plaintiff (Recalled in Rebuttal).

G. H. THAYER, produced as a witness on behalf of the plaintiff, being recalled in rebuttal, testified as follows:

(Mr. IMUS.)

I know that there is a small hatch on the rear of [380] the "Queen." A man can't climb down into it. It is directly over where the rudder post comes up through the boat and is for the purpose of getting at the tiller to adjust the tiller line. I don't think it is more than a foot from the hatch down to the planking of the boat.

I heard Captain Reid testify the other day that there were two entrances to the engine-room. The one from the pilot-house goes down probably five or six feet into the engine-room and the other goes in from the forward end of the cabin.

It is a common thing to see automobiles standing on Geranium Street near the corner of River Street almost any time of the day or night.

Cross-examination.

(Mr. KEENAN.)

I worked for Captain Reid on the "Queen." I never was discharged that I know of. I have not

(Testimony of G. H. Thayer.)

worked for him now for over a year. I quit voluntarily. Defendant's Exhibit "Y" for identification is a fair plan of the deck of the "Queen." The space with the word "cabin" on represents the cabin on the boat. And the rear end of the exhibit, the place where the diagonal line is, represents a door that goes from the cabin out to the rear platform. The space designated "engineroom" is located in relation to the cabin just as it is represented on the plat. I think there is about fifty feet of space underneath the entire deck.

At the point where the automobile is said to have been standing there isn't any building.

Testimony of William J. Pomeroy, for Plaintiff (Recalled in Rebuttal).

WILLIAM J. POMEROY, produced as a witness on behalf of the plaintiff, being recalled in rebuttal, testified as [381] follows:

(Mr. LANGHORNE.)

My name is William J. Pomeroy. I have worked on the "Queen" for six or seven years. During all that time I never saw Captain Reid or anybody else walk around that little three inch planking on that steamer.

I am familiar with the point where it is said that an automobile was standing on the night of March 17th. I have often seen automobiles standing at that same place both day and night.

When I am sitting in the pilot-house my head and shoulders are above the after cabin. The after

(Testimony of J. Pomeroy.)

cabin is where the people sit. When I am running the boat across the river I am continuoulsy looking around behind me. I am compelled to do that. If you don't look behind you you are liable to get run over. There is a light in front of my cabin. There was one on the roof of the boat on the night of March 17th as we crossed the river.

Cross-examination.

Mr. RUPP.)

The steamer "Queen" is 58 inches over all. From the forward end of the pilot-house to the forward end of the boat is about 21 feet 6 inches. There is a hatch in the forward end of the boat. It is about 22 inches square. There is a hatch in the after end of the boat. I should judge it is about 16 inches square. The cabin is 13 or 14 feet long something like that. The engine-room is about 10 feet. The pilot-house I should say is 3½ feet. All measurements are measured under deck. The passageways are about [382] 2 feet 8 inches or 2 feet six inches. The railing shown is about 30 inches high.

I don't know whether the tracts marked "A." "B" and "C" on the plat shown me belong to the railroad company or not. I don't know whether the tract marked "B" was entirely unoccupied.

Q. How about this tract in here; did it have anything on it except the bill board.

Mr. LANGHORNE.—That is where the automobile stood.

A. Yes; a blacksmith-shop and a building both.

(Testimony of William J. Pomeroy.)

- Q. Where on this tract of ground is this black-smith-shop?
 - A. I should judge it is right in here (indicating).
- Q. All right, we will mark that "C" then. You think the blacksmith-shop is there? A. Yes.

There is nothing in the space marked "B" except a garden. There is no building in the block marked "C" except a blacksmith-shop and there is a warehouse right in there. The warehouse is about 150 feet back from Geranium Street. The picture shown me looks like the locality we have been talkabout, looking from the depot up town. It does not show the blacksmith-shop. That shop is behind that bill board. The bill-board also shuts off the view of the warehouse.

Photograph referred to admitted in evidence and marked Defendants' Exhibit "Z."

Mr. RUPP.—I offer this deck plan of the boat in evidence as a part of the cross-examination.

Diagram referred to is admitted in evidence and marked Defendants' Exhibit "Y." [383]

Testimony of A. J. Davis, for Plaintiff (In Rebuttal).

A. J. DAVIS, called as a witness in rebuttal for plaintiff, being sworn, testified as follows:

My name is A. J. Davis. I live in Tacoma. Previous to living in Tacoma I lived in Kelso for five years. While there I was engaged in the shingle business. I knew Fred L. Stewart very well. We had business dealings all the time I was

(Testimony of A. J. Davis.)

there. Some of the noticeable things about Fred Stewart's appearance was his erect carriage and when I first knew him he had quite a heavy head of hair, very wavy; gold teeth that were more or less noticeable—I think quite so. I always noticed his teeth. There were gold fillings on both sides. Before I left Kelso I noticed that Stewart had changed his style of wearing his hair. He was combing it straight back. The waves had disappeared.

I recognize Defendants' San Diego Exhibit "1" as a photograph of Fred Stewart as he appeared when I first knew him. He had no such head of hair as shown in that photograph when I last saw him. His hair was considerably thinner.

Cross-examination.

(Mr. KEENAN.)

I presume I would have recognized him no matter how he combed his hair. I have known him for ten or twelve years. I presume I know a great many men who have some gold in their teeth. Mr. Stewart had an erect carriage,—that is, some time ago. I have not seen so much of him for the last four or five years.

Testimony of Hazel Brush, for Plaintiff (In Rebuttal).

HAZEL BRUSH, being called as a witness in rebuttal for plaintiff, being sworn, testified as follows: [384]

(Mr. LANGHORNE.)

My name is Hazel Brush. I am the wife of P. T.

(Testimony of Hazel Brush.)

Brush who testified this morning. I am now living in Tacoma. In 1914 we lived in Kelso. When living there I was very well acquainted with Mr. and Mrs. Fred L. Stewart. I know that on Easter Sunday in 1914 Mrs. Stewart came home from Portland and that she was ill all that summer and I was there all of the time except during August; and when I came home from the beach where we had been, she was still in bed and was there during all the month of September.

Testimony of Maude E. Stewart, in Her Own Behalf (Recalled in Rebuttal).

MAUDE E. STEWART, the plaintiff, being recalled on her own behalf in rebuttal, testified as follows:

(Mr. LANGHORNE.)

Defendants' San Diego Exhibit "1," which is a photograph of my husband was taken before I ever knew him and I met him in September of 1909. Plaintiff's Exhibit 36 which is a photograph of my husband was taken in September of 1920. About eight years ago, Mr. Stewart started to comb his hair pompadour, combed in straight back, and his hair had thinned a great deal the last few years and had grown back so that he was bald back of the temples, and his hair was very much thinner.

Mr. Stewart did not go to Rainier National Park in 1914. Mr. Stewart never was at the mountain until 1919 when he went on the Northern Life trip. The Northern Life offers some sort of a trip to (Testimony of Maude E. Stewart.)

their agents who have written \$100,000 of life insurance, and my husband had qualified that year and we both took this trip to the mountain in 1919. I know positively that this was the first trip he had ever [385] made to the mountain. I was ill in 1914 from Easter Sunday until the last of September and Mr. Stewart was not away from home overnight during that time. The nature of my illness was tubercular. My physicians were Ralph Matson of Portland and Dr. Knox. I had a nurse with me from the 12th of April, 1914 until the last of September, 1914.

I heard the testimony of Mr. Onorato that he saw me and my boy in Elsinore, California subsequent to July 1, 1921. That is not true. I left Elsinore, California, the 14th day of June, 1921, and have not been back there since. When I left Elsinore I went to Los Altos, a little town about eighteen miles from San Jose, to my aunt's and stayed there for six weeks. I reached Los Altos the 15th of June. The reason I remember this, my sister was leaving for the east that same day.

Mr. Stewart had a very fair skin. I heard read the deposition of one of the men on the boat running between San Pedro and the Mexican ports, who testified that his complexion was sandy or reddish but that does not describe my husband. Mr. Stewart could not swim. I never saw him in the water in my life. We have been to the beach together.

I had an interview with Captain Reid on March 29, 1921, in Kalama. During that interview I (Testimony of Maude E. Stewart.)

asked him why he was now telling that six men got off the boat when he formerly told me there were only five and he replied by stating that he did not remember of ever telling me that only five men got off the boat. I told him that he did so tell me and he then replied by saying that he was not on the witness-stand and that he could say anything he wanted to. I asked him in the same conversation why his views had changed since [386] August, 1921, when he told me that his testimony would win the case. He replied by saying, "That was before the other matter came up" and I asked him what he meant by that remark and he said "That was before the insurance companies started fighting you so hard." I then said to him, "How would that add one to the number of men you now say got off the boat," and he said, "I can't remember of telling you that only five men got off the boat," and I said, "I certainly remember of your telling me that," and he then said, "It is your word against mine and the Court will have to choose between us."

Cross-examination.

(Mr. RUPP.)

I had a picture of myself and son taken some time ago. Mr. Stewart kept a copy of that photograph in the bank. I asked for that picture on the 18th of March and Mr. Plamondon said he could not find it but when I was in Kelso last summer Miss Waugh brought me the picture and said she located it in the drawer of the desk.

(Testimony of Maude E. Stewart.)

Redirect Examination.

(Mr. LANGHORNE.)

Defendants' Exhibit "D" which is a photograph of my husband was taken about 1921. I can't say exactly. I think it was taken shortly after the bank was built.

Recross-examination.

(Mr. RUPP.)

The date when Miss Waugh delivered me this photograph I have spoken of was some time last summer.

I was in Elsinore some time prior to June 14th. I had been there from the 31st of March to the last named [387] date. Elsinore is a very small town. Of course myself and boy would walk around the streets once in a while.

Testimony of Francis K. Wilton, for Plaintiff.

FRANCIS K. WILTON, called as a witness by the plaintiff, being first duly sworn, testified as follows:

(Mr. LANGHORNE.)

My name is Francis K. Wilton. I live in Chicago, Illinois. I am thirty-seven years old. I am an investigator for The Prudential Insurance Company of American, one of the defendants in this action. I started out on this investigation on June 3, 1921. I began making my investigations at Kelso, Washington. I procured a photograph of Fred Stewart at that place. I had duplicates made of that photograph. It is the same one that has

been introduced in evidence at San Francisco, Hanford and Riverside.

Mr. LANGHORNE.—That is the plaintiff's case, your Honor.

The COURT.—Is all the evidence in?

Mr. RUPP.—Defendants rest. I now move at this time, if the Court please, for a dismissal of this action upon the ground, first, that there was no satisfactory proof of death presented to the life insurance companies, or either of them, prior to the commencement of this action, or at any other time, and second, upon the whole case there is no sufficient evidence of the death of the said Frederick L. Stewart.

The COURT.—Does either side desire to argue the case? Of course I will consider that motion along with any argument on the facts.

Thereupon the case was argued to the Court by Mr. Rupp and Mr. Keenan for the defendants and by Mr. Langhorne for the plaintiff. [388]

Decision of the Court.

The COURT.—I think I am as well prepared to decide this case now as I would be if I should take such odd times as I can take from my other work to peruse the depositions and study the record in the case further, and that is all that I would be able to do if I did not decide it now. It might be more satisfactory to sit down and take this record and go through it thoroughly again uninterruptedly in the Court's chambers or closet, but it can't be done.

Regarding the law of the case it appears to me that there is this distinction between the question of suicide as it ordinarily comes up in these cases and this case: In the ordinary case where suicide is considered, the presumption that a man did not kill himself, that is where his death is proven, the presumption that he died by some other means than his own hand intentionally used against himself stands out without anything to take from it, but in this case the Court is asked to choose between the theory that he destroyed himself physically by his own act and the theory that he banished himself from his friends and relatives forever and became a wanderer and a tramp on the face of the earth, constantly alert, scanning every face for some look of recognition. You say he was a longheaded man. If he was he must have known that was the fate that awaited him if he fled.

The importance of just what was in his mind and what his circumstances were cannot be over-estimated in determining just what he did and to understand the actions that witnesses have testified to, testifying on his part. [389] Now the fact that he was in trouble and had been in trouble for a long time might make him a fugitive or might make him a suicide. That does not get the Court or anyone else very far in determining just what he did. His conduct on that morning in parting from his family I interpret that he had not yet made up his mind to commit suicide, though he had been thinking of it. Hope is very strong in every one. After he learned at Portland or after this bank examiner

or officer Hay left him there and after he learned that the bank was closed, I think he began, in addition to his other motives, thinking of suicide, and possibly thinking of the alternative of escape, that he then began to fear arrest, whether rightly or whether he deserved arrest or whether he did not. What the Court looks for is what the condition of his mind was. He probably got to thinking that is what Hay had gone back for, to close the bank and get out papers for his arrest. Therefore when he left the hotel he probably intended, just as defendants' counsel have argued, to go down the river, but he took a taxi for the Union Station so that if inquiry was made after he left by anyone seeking his arrest they would be thrown off the scent to that extent temporarily.

If, as defendants' counsel have argued, he was seeking to act strangely and attract attention he would not have stopped outside the Union Station, out there in the dark, where the porter alone saw him. He would have paraded himself through the corridors of the station I take it. Evidently he thought there might be some one in the station he would not want to meet. He then went to take the train down the river. As I conclude, possibly he had not yet made up his mind to commit suicide. A man would naturally [390] put it off as long as he could unless he was suddenly overcome with an impulse. It is not exactly clear about his conduct on that trip down the river to the Court, but when you say that he was laving the foundation for his flight, but to to create the impression that

he committed suicide, probably a man who is going to commit suicide for the benefit of those he leaves behind him, he may dread if he takes the step that he may be rescued when he doesn't want to be rescued, and yet he wants to make it so sure that there will be witnesses that he did kill himself that he wants to have it done under circumstances where he will not only not be immediately rescued, say he determined to drown himself, but that a sufficient number of witnesses will know that that was the only way he could have disappeared. Therefore the fact that he did many things on the trip down to attract attention to himself weighs about as much one way as the other. That is he wanted everybody to recognize him so that each step could be traced, whichever motive was in his mind. That conduct would be about as natural in one case as the other.

His getting on the boat and his conduct from there on it seems to the Court the more reasonable explanation of it is that it was suicide, because whatever did happen he could not have anticipated that that is the way it would turn out. He knew he was a marked man, he knew the bank was closed, knew they were all watching him, knew or probably felt that he would be followed up, his motions on the boat. Shotswell who collected his fare did not collect it when he collected it from others and he stood there watching him. So when he went out the rear of the boat he would feel that [391] that he probably would be followed within a half a minute; he could not know that he would

not immediately be followed out there and could hang on the side of the boat in perfect security, that no one was thinking of him and no one on the boat had him in the least in their minds. He must have felt they were all thinking about him more or less, whether they were or not.

This conduct such as his has been studied by dramatists and novelists and I think that his reasoning, his emotions and his actions probably pictured by that of Oily Gammon and John Carker, and this writing of letters and making appointments and having his car fixed, arranging for it in Portland, and all those things are old symptoms and actions of men who are contemplating destroying themselves. If he contemplated flight to southern California he never would have mentioned his wife going to his father in California and he never would have talked with the garage man about his taking a trip to California. If he was going to run the other way he might have done so. The Court cannot conceive that a man as well known as he apparently was and living as near Portland as he did would ever flee from Kalama and take that night train for California. It might happen three times out of four that he would not see anybody on that train that he would know, but he would feel that every train that he got on between Portland and California would be full of people he would know.

Again the use by him, if he contemplated flight, of a life-preserver, if he had any confederate, and the Court finds nothing in this case to justify a

suspicion that he [392] could have had a confederate, things moved so fast from the time that Hay came, the night before. When he went to Portland, as I have found, he still was strong in hope that he might get through, and therefore I cannot find any opportunity for confederation or any-not opportunity, but any incentive to be formulating a plot to build up a suicide theory at Kalama. That is before he went to Portland. If in the afternoon at Portland such a thing came into his mind, how is the Court to find anything to base a conclusion on that he had the opportunity to do it. He could not with five men on the boat and he knew not how many at the landing, a lighted landing, what hope -whether he did in fact go up there without any body seeing him, he could not hope to do so; he could not know in his own mind that it would turn out that way. If he was tortured with a fear of discovery, why, he would think that everybody was looking for him and many people down there that he would have to run the gauntlet of as he went up that slip.

About the men Mr. Shotswell and Mr. Reid, the Court concludes that in the flight of time, talking about this many times and thinking about it many times, this man that they testified to having gone over across the tracks there between them each one probably saw the other and what they think they recollect about that is either Mr. Shotswell has confused Mr. Reid with that man that went up there or with some of the others who followed later. What leads me to that conclusion is this: that it was very apparent that Mr. Shotswell wanted to get that man as far from him as he could down toward Mr. Reid and Mr. Reid seemed equally inclined to get him up as close to Shotswell as he could. [393]

Mr. LANGHORNE.—Chisholm.

The COURT.—Chisholm, yes. Mr. Reid had him almost up there going across where Chisholm went across and Mr. Chisholm had him almost back as far as Reid was standing. This matter of the automobile, this court has tried so many cases where there were automobiles acting strangely down in that country for other reasons than people running away that were insured, that even if that automobile was acting strangely, the Court does not associate it particularly with Mr. Stewart.

There is more difficulty so far as the Court is concerned with the fact that the body is not recovered and Mr. Elwood. Is that the man's name?

Mr. KEENAN.—Yes.

The COURT.—But his body was not recovered and other bodies have not been recovered. If he was building up a proposition that he wanted to leave the impression that he had drowned himself when he hadn't—men often leave their old clothes on the bank of a river or hat or something—it would not have been very difficult for Mr. Stewart to have provided himself with some package that would have floated that might have been found, if he was a very longheaded man.

Regarding Mr. Elwood's testimony, aside from the fact that I have pointed out that one of the

last things in the world Mr. Stewart would have done is to have taken immediately a train for California, is this: What he would necessarily have to have done to have reached Hanford by the 20th. It was physically possible, but undoubtedly the railroad men on the train that he must have taken would [394] have seen him, if he tried to hide in a stateroom so that he would not see anybody that he might know the porters on the train would have remembered it, and if he did not freely move about the train others he probably knew would have seen him. The Court concludes that Mr. Elwood did see somebody in Hanford on the 20th that he thought was Stewart. Why I think it was the 20th is this: that Mr. Elwood said it was the 22d of February; he said it was a holiday, when the restaurants and barber-shops were open. Well, the 20th, as I look at the calendar, appeared to be Sunday, and probably there would be only a few places open on Sunday. But all of these witnesses that have seen men that they thought—testified was Fred Stewart—It must have been true that in everyone's life they have had experience when they mistook one person for another, for what I presume people in thinking about cases of mistaken identity do not sufficiently take into account is this: That you pass a person on the street and you are mistaken about who he is. There is nothing to call your attention ordinarily to the fact that you are mistaken. You go on thinking that is the man you met. In the humdrum ordinary existence of an individual nothing comes in view to correct your mistake. Therefore out of all the people on the Pacific Coast, when a man that was well known, prominently known, to many people, suddenly disappears it is not at all extraordinary that within the course of several months among the people who knew him may be found people that thought they had seen him after the event, that is taking into account the fact that the event that has disappeared has not been called to their atention [395] until after the time that they thought they saw him. In such case as that the proof, to overcome this well known fact or facts that when thought about must be realized, would have to be a much more positive identification than anything that has occurred in this case. People seeing one another in passing automobiles or seeing one pass in an automobile or seeing one on a sidewalk when they are riding in an automobile, certainly falls far short of what is necessary. As the man who claims to have met him on the sidewalk he did not speak to him. The very fact that he did not speak to a man whom he knew, meeting him away from home. goes a long way to convince the Court that the recognition dwells more in memory than was actual at the time From his conduct on the boat it appears to me that he had not probably until the last moment made up his mind to actually commit suicide. I do not need to be told that he did not sleep the night before and he had been driving hard all day. while he was in Portland trying to find a way out. and then when Hay left him going on with his writing and other activities, and getting on the train and that did not go fast enough and getting into an automobile and driving that, and probably the first time he slowed up or tried to slow up was after he got on the bow of that boat, and he could not do it.

Judgment for plaintiff.

Mr. RUPP.—In order that the record may be kept correct, you deny my motion to dismiss, I except and you allow an exception.

The COURT.—Motion denied and exception allowed. [396]

COPY OF RULE 75.—BILLS OF EXCEPTIONS.

A bill of exceptions to any ruling may be reduced to writing and settled and signed by the Judge at the time the ruling is made, or at any subsequent time during the trial, if the ruling was made during a trial, or within such time as the Court or Judge may allow by order made at the time of the ruling, or if the ruling was during a trial, by order made at any time during the trial, or within the time herein after mentioned, and when so signed shall be filed with the clerk.

If not settled and signed as above provided, a bill of exceptions may be settled and signed as follows:

The party desiring the bill shall within ten days after the ruling was made, or if such ruling was made during a trial, within ten days after the rendition of the verdict, or, if the case was tried without a jury within ten days after written notice of the

rendition of the decision, serve upon the adverse party a draft of the proposed bill of exceptions. The exception must be accompanied with a concise statement of so much of the evidence or other matter as is necessary to explain the exception and its relation to the case, and to show that the ruling tended to prejudice the rights of such party. Within ten days after such service, the adverse party may serve upon the proposing party proposed amendments to the proposed bill. Such proposed bill and the proposed amendments shall within five days thereafter be delivered by the proposing party to the clerk for the Judge. The Clerk must, as soon as practicable thereafter, deliver said proposed bill and amendments to the Judge, who must thereupon designate a time which he will settle the bill; and the clerk must, as soon as practicable, thereafter notify or inform both [397] parties of the time so designated by the Judge. In settling the bill the Judge must see that it conforms to the truth, and that it is in proper form, notwithstanding that it may have been agreed to by the parties, or that no amendments may have been proposed to it, and must strike out of it all irrelevant, unnecessary, redundant, and scandalous matter. After the bill is settled, it must be engrossed by the party who proposed the bill, and the Judge must thereupon attach his certificate that the bill is a true bill of exceptions; and said bill must thereupon be filed with the clerk. [398]

State of Washington, County of Pierce.—ss.

BE IT REMEMBERED, these causes coming on at this time and regularly to be heard in open court, in conformity with the rules of said Court, for the settlement and certification of the bill of exceptions in the foregoing entitled actions pursuant to due notice, all parties being present by their respective counsel;

Therefore, I. Edward E. Cushman, Judge of the United States District Court for the Western District of Washington, Southern Division, the Judge before whom said causes were tried, in conformity with the rules of said Court, do hereby certify that the matters and proceedings contained in the foregoing bill of exceptions are matters and proceedings occurring in said causes and the same are hereby made a part of the record herein, and that the same contains all the exhibits and all the material facts, matters and proceedings heretofore occurring, and the evidence received in said causes. not already a part of the record herein.

I do hereby further certify that the foregoing bill of exceptions contains all the evidence and testimony adduced upon the trial of said causes, together with all objections and exceptions made and taken, at the time, to the admission or exclusion of testimony, and all motions, offers to prove, and admissions and rulings thereon, and all objections and exceptions taken and allowed at the time of

the respective rulings, and that the exhibits herein mentioned and hereto attached are all the exhibits adduced upon the trial of said causes.

I do hereby further certify that the foregoing bill of exceptions was prepared and submitted to Maurice A. Langhorne, [399] attorney for plaintiff, on the 26th day of May, 1922, for his examination and inspection; that on or about June 6, 1922, he returned said bill of exceptions to Otto B. Rupp, one of the attorneys for defendants with certain additions and amendments thereto and all of which were accepted by defendants, thereupon said bill of exceptions was assembled and bound together with all the amendments and additions submitted by said counsel for plaintiff, whereupon the contents of said bill of exceptions with all the exhibits on file in the Clerk's office to be annexed was agreed upon by all parties to said action. Service of the same was admitted by counsel for plaintiff on June 14th, 1922, and was within proper time delivered to the Clerk of this court on said 14th day of June, 1922, in accordance with rule seventy-five of this court, and no amendments have been offered, no objections made to the form or contents of said bill since its delivery to the clerk; that the Clerk of said court did not deliver to, nor call to the Court's attention to the delivery of said bill of exceptions to him; that on June 14th, 1922, on stipulation of the parties, an order was made and entered herein by this Court directing that certain exhibits be sent up on writ of error and not copied into the records;

that at all of said times the following was and is a rule of this court:

"In all cases which, within thirty (30) days prior to the expiration of a term of court, an order, judgment or decree has been made or entered, the terms shall be extended for thirty (30) days beyond the statutory period for further action and proceedings therein. This rule to take effect as of May 1, 1922";

that within such period of thirty (30) days, viz: on July 31, 1922, this Court fixed this, the 5th day of August, 1922, in open court, as the time and place for the certification and settlement of the Bill of Exceptions in said causes: [400] that on July 11, 1922, counsel for defendants ascertaining that the agreed bill of exceptions had not been certified, conferred with H. G. Fitch of counsel for plaintiff and requested that he go with them before the Court and have the bill certified, and at the request of counsel for plaintiff no further action was taken in the matter by counsel for defendants until July 26th when a motion was made to bring the matter before the Court; said motion was set down by the Clerk for July 31st, 1922, and pursuant to the request of counsel for the plaintiff, continued to August 5, 1922; that in the settlement and certification of the bill of exceptions the Court considered the affidavits of Otto B. Rupp, the affidavit of J. E. Peterson, and the affidavit of H. G. Fitch, on file in said causes, and also rule seventyfive of this court, a copy of which is attached to said bill of exceptions.

This bill of exceptions is signed over the objection and protest of counsel for plaintiff, based upon the proposition that this Court is without jurisdiction to sign and settle said bill of exceptions upon the ground and for the reason that the February, 1922, term of this court expired on July 3, 1922, but said objection is overruled and an exception allowed.

I further certify that since June 14, 1922, the date on which the bill of exceptions was lodged with the Clerk of this court, I have been at all times within the district holding court either in Tacoma or Seatile.

Done in open court this 5th day of August, 1922. EDWARD E. CUSHMAN,

Judge. [401]

[Indorsed]: Aug. 5, 1922. [402]

No. 3436-No. 3437.

Assignments of Error.

Now comes the Prudential Insurance Company of America, one of the defendants in the above-numbered and entitled causes, and in connection with its petition for a writ of error in this cause, assigns the following errors which defendant avers occurred on the trial thereof, and upon which it relies to reverse the judgment entered herein as appears of record:

I. In permitting the witness, Claude P. Hay, the bank examiner to testify, in substance, as follows:

I closed the bank. I found arms, pistols and a sawed off shot gun. I unloaded them because I wanted to remove any opportunity that Mr. Stewart might have to do anything rash. I was a little concerned as to what he might do. [403]

- 2. In permitting said witness to testify as follows: Plamondon called me up and asked me to come down to his house. When I stepped on the porch at Mr. Plamondon's house the door was opened and as I stepped in he said, "Well Fred has done it." I said, "Did he shoot himself?" and he said, "No, he went in the river."
- 3. In permitting H. E. McKenney to testify, in substance, to the financial condition of Stewart's estate, as shown by the probate proceedings.
- 4. In permitting the witness George F. Plamondon to testify, in substance, that he told the bank examiner Hay that Stewart made away with himself.

At the time the testimony was offered as referred to in the preceding numbers, 1, 2, 3, and 4, defendant duly objected, an exception was taken and allowed.

- 5. In admitting and receiving in evidence plaintiff's Exhibit "20," being the affidavit of Maude E. Stewart concerning her so-called proof of death under the policy issued by the Mutual Life Insurance Company of New York, over the objection of defendant to which an exception, at the time. was allowed.
- 6. In admitting and receiving in evidence, over the objection of the defendant, Exhibit "21" to which objection an exception was allowed.

- 7. In admitting and receiving in evidence the letter of Sardam and the so-called proofs of death submitted by Mrs. Stewart regarding the policies issued by the Mutual Life Insurance Company of New York, all included in Plaintiff's Exhibit "18," to the offer of which defendant, at the time, objected, the objection being overruled and an exception was duly allowed.
- 8. In admitting and receiving in evidence the letter of March 13, 1921, by Sardam to the Mutual Life Insurance Company to which the defendant, at the time, objected, the objection being overruled and an exception was duly allowed.
- 9. In admitting and receiving in evidence Plaintiff's Exhibit "22," being the affidavit of Maude E. Stewart and her so-called proof of death under policies issued by the Mutual Life Insurance Company of New York to the introduction and reception of which, at the time defendant objected and the objection being overruled and an exception was duly allowed.
- 10. In admitting and receiving in evidence Plaintiff's Exhibit "23," the affidavit of Paul G. Shotswell, the offer of which was objected to, at the time, the objection being overruled and an exception was duly allowed.
- 11. In admitting and receiving in evidence Plaintiff's Exhibit "24," being the letter from Hayden, Langhorne & Metzger, concerning proof of death, to the offer of which defendant at the time objected, the objection being overruled and an exception was taken and duly allowed.

- 12. In admitting and receiving in evidence Plaintiff's Exhibit "25," being the letter of H. G. Fitch, to which defendant at the [404] time objected the objection being overruled, and an exception was duly allowed.
- 13. In admitting and receiving in evidence the letter of F. J. Sardam, March 23, 1921, being Plaintiff's Exhibit "27," to the offer of which defendant at the time objected, the objection being overruled and an exception was duly allowed.
- 14. In admitting and receiving in evidence Plaintiff's Exhibit "28" being the original letter of April 18, 1921, by Sardam to the Prudential Insurance Company, and so-called certificates of proofs of death signed by Maude E. Stewart, to the offer and reception of which defendant, at the time objected, objection being overruled and an exception was duly allowed.
- 15. In admitting and receiving in evidence Plaintiff's Exhibit "29", being three affidavits signed by Maude E. Stewart and a letter from Fitch, dated May 13, 1921, to which offer the defendant at the time objected, the objection being overruled and an exception was duly allowed.
- 16. In admitting and receiving in evidence Plaintiff's Exhibit "30" being the original affidavit of Paul G. Shotswell, also letters of Hayden, Langhorne & Metzger, to which offer defendant at the time objected, the objection being overruled and an exception was duly allowed.
- 17. In admitting and receiving in evidence Plaintiff's Exhibit "31," letter of July 14, 1921,

written by Hayden, Langhorne & Metzger, to the offer of which defendant at the time objected, the objection being overruled and an exception was duly allowed.

- 18. In admitting and receiving in evidence, all written statements, memoranda and other papers, annexed to or made a part of all the foregoing instruments offered and received in evidence to all of which at the time defendant first duly objected, the objection being overruled and an exception was allowed in each instance.
- 19. In overruling the motion of defendant, at the close of the trial and after the reception of all testimony for the dismissal of said action upon the grounds, first, that there was no due or satisfactory proof of death presented to defendant on either of its policies prior to the commencement of the action, or at any time; second, that upon the whole case the evidence was insufficient to justify the conclusion that Frederick L. Stewart was dead, that the evidence in the case did show that Stewart is living, which motion was overruled and at the time an objection to said ruling was duly taken and an exception allowed.
- 20. The Court erred in its oral opinion at the close of the cause holding that Frederick L. Stewart was dead and in further holding that the plaintiff in the cause was entitled to judgment against the defendant.
- 21. The Court erred in making special Finding of Fact "X", to which finding defendant at the

time and in writing objected, the objection was overruled and an exception allowed.

- 22. The Court erred in making special Finding of Fact "XL" to which finding defendant at the time and in writing objected, the objection was overruled and an exception allowed. [405]
- 23. The Court erred in its special Conclusion of Law No. "II," which conclusion of law was objected to at the time by defendant, said objection was overruled and an exception duly allowed.
- 24. The Court erred in its special Conclusion of Law No. "III," which conclusion of law was objected to at the time by defendant, said objection was overruled and an exception duly allowed.
- 25. The Court erred in refusing to make Findings of Fact in favor of defendant as proposed by defendant at the time and prior to its making findings in this case, which proposed findings of fact are in writing numbered from one to six, which proposed findings of fact and each of them were, at the time, overruled by the Court and an exception duly allowed to defendant from the Court's ruling upon each of said proposed findings of fact.
- 26. The Court erred in failing to adopt the conclusion of law numbered one and two as proposed in writing by defendant prior to his making findings and conclusions in the case, which proposals were at the time overruled by the Court and an exception to such rulings being duly allowed.
- 27. The Court erred in signing and entering judgment in said cause against defendant in said case.

In each and every of said Assignments of Error, from one to twenty-seven inclusive, the objection to each ruling of the Court was made, at the time, an exception was duly taken and an exception allowed at the time of such ruling.

WHEREFORE, defendant prays that the judgment of said Court be reversed and that judgment be directed to be entered therein in favor of the defendant and against the plaintiff, for the dismissal of said cause and for its costs.

Dated at Tacoma, Washington, August 12, 1922. S. A. KEENAN,

Attorney for Defendant Prudential Insurance Company of America.

Copy of within assignments of error received and due service of same acknowledged this 12th day of August, 1922.

H. J. FITCH,

HAYDEN, LANGHORNE & METZGER,
Attorneys for Plaintiff.

[Indorsed]: Aug. 12, 1922. [406]

No. 3436—No. 3437.

Assignments of Error.

Now comes The Mutual Life Insurance Company of New York one of the defendants in the above numbered and entitled causes and in connection with its petition for a writ of error in this cause, assigns the following errors which defendant avers occurred on the trial thereof, and upon which it 376

relies to reverse the judgment entered herein as appears of record:

- 1. In permitting the witness Claude P. Hay, the bank examiner, to testify, in substance, as follows: I closed the bank. I found arms, pistols and a sawed off shot gun. I unloaded them because I wanted to remove any opportunity that Mr. Stewart might have to do anything rash. I was a little concerned as to what he might do.
- 2. In permitting said witness to testify as follows: Plamondon called me up and asked me to come down to his house. When I stepped on the porch at Mr. Plamondon's house, the door was opened and as I stepped in he said, "Well, Fred has done it." I said, "Did he shoot himself?" and he said, "No, he went in the river." [407]
- 3. In permitting H. E. McKenney to testify, in substance, to the financial condition of Stewart's estate, as shown by the probate proceedings.
- 4. In permitting the witness George F. Plamondon to testify in substance, that he told the bank examiner Hay that Stewart made away with himself.

At the time the testimony was offered as referred to in the preceding numbers, 1, 2, 3 and 4, defendant duly objected an exception was taken and allowed.

5. In admitting and receiving in evidence Plaintiff's Exhibit "20," being the affidavit of Maude E. Stewart concerning her so-called proof of death under the policy issued by the Mutual Life Insurance Company of New York, over the objection of

defendant to which an exception, at the time, was allowed.

- 6. In admitting and receiving in evidence, over the objection of defendant, Exhibit "21" to which objection an exception was allowed.
- 7. In admitting and receiving in evidence the letter of Sardam and the so-called proofs of death submitted by Mrs. Stewart regarding the policies issued by the Mutual Life Insurance Company of New York, all included in Plaintiff's Exhibit "18" to the offer of which defendant, at the time, objected, the objection being overruled and an exception was duly allowed.
- 8. In admitting and receiving in evidence the letter of March 13, 1921, by Sardam to the Mutual Life Insurance Company to which the defendant, at the time, objected, the objection being overruled and an exception was duly allowed.
- 9. In admitting and receiving in evidence Plaintiff's Exhibit "22" being the affidavit of Maude E. Stewart and her so-called proof of death under policies issued by the Mutual Life Insurance Company of New York to the introduction and reception of which, at the time defendant objected and the objection being overruled and an exception was duly allowed.
- 10. In admitting and receiving in evidence Plaintiff's Exhibit "23" the affidavit of Paul G. Shotswell, the offer of which was objected to at the time, the objection being overruled and an exception was duly allowed.

- 11. In admitting and receiving in evidence Plaintiff's Exhibit "24" being the letter from Hayden, Langhorne & Metzger concerning proof of death, to the offer of which defendant at the time objected, the objection being overruled and an exception was taken and duly allowed. [408]
- 12. In admitting and receiving in evidence Plaintiff's Exhibit "25" being the letter of H. G. Fitch, to which defendant at the time objected, the objection being overruled and an exception was duly allowed.
- 13. In admitting and receiving in evidence the letter of F. J. Sardam, March 23, 1921, being Plaintiff's Exhibit "27" to the offer of which defendant at the time objected, the objection being overruled and an exception was duly allowed.
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horne & Metzger, to which offer defendant at the time objected, the objection being overruled and an exception was duly allowed.

- 17. In admitting and receiving in evidence Plaintiff's Exhibit "31," letter of July 14, 1921, written by Hayden, Langhorne & Metzger, to the offer of which defendant at the time objected, the objection being overruled and an exception was duly allowed.
- 18. In admitting and receiving in evidence, all written statements, memoranda and other papers, annexed to or made a part of all the foregoing intruments offered and received in evidence to all of which at the time defendant first duly objected, the objection being overruled and an exception was allowed in each instance.
- 19. In overruling the motion of defendant, at the close of the trial and after the reception of all testimony for the dismissal of said action upon the grounds, first, that there was no due or satisfactory proof of death presented to defendant on either of its policies prior to the commencement of the action, or at any time; second, that upon the whole case the evidence was insufficient to justify the conclusion that Frederick L. Stewart was dead, that the evidence in the case did show that Stewart is living, which motion was overruled and at the time an objection to said ruling was duly taken and an exception allowed.
- 20. The Court erred in its oral opinion at the close of the cause holding that Frederick L. Stewart was dead and in further holding that the plain-

tiff in the cause was entitled to judgment against the defendant. [409]

- 21. The Court erred in making special Finding of Fact VIII to which finding defendant at the time and in writing objected, the objection was overruled and an exception allowed.
- 22. The Court erred in making special Finding of Fact IX to which finding defendant at the time and in writing objected the objection was overruled and an exception allowed.
- 23. The Court erred in its special Conclusion of Law No. "II" which conclusion of law was objected to at the time by defendant, said objection was overruled and an exception duly allowed.
- 24. The Court erred in its special Conclusion of Law No. "III" which conclusion of law was objected to at the time by defendant, said objection was overruled and an exception duly allowed.
- 25. The Court erred in refusing to make Findings of Fact in favor of defendant as proposed by defendant at the time and prior to its making findings in this case, which proposed findings of fact are in writing numbered from one to six, which proposed findings of fact and each of them were, at the time, overruled by the Court and an exception duly allowed to defendant from the Court's ruling upon each of said proposed findings of fact.
- 26. The Court erred in failing to adopt the conclusion of law numbered one and two as proposed in writing by defendant prior to his making findings and conclusions in the case, which proposals

were at the time overruled by the Court and an exception to such rulings being duly allowed.

27. The Court erred in signing and entering judgment in said cause against defendant in said case.

In each and every of said Assignments of Error, from one to twenty-seven inclusive, the objection to each ruling of the Court was made, at the time, an exception was duly taken and an exception allowed at the time of such ruling.

WHEREFORE, defendant prays that the judgment of said Court be reversed and that the judgment be directed to be entered therein in favor of the defendant and against the plaintiff for the dismissal of said cause and for its costs.

Dated at Tacoma, Washington, August 12th, 1922. CHADWICK, McMICEN, RAMSEY & RUPP,

Attorneys for Defendant.

Copy of within assignments of error received and due service of same acknowledged this 12th day of August, 1922.

H. J. FITCH,

HAYDEN, LANGHORNE & METZGER,
Attorneys for Plaintiff. [410]

[Indorsed]: Aug. 12, 1922. [411]

No. 3436.

Petition for Order Allowing Writ of Error.

The said defendant, Prudential Insurance Company of America, a corporation, feeling itself ag-

grieved by the judgment entered in said cause on the 24th day of April, 1922, in favor of said plaintiff and against said defendant for the sum of thirtyfive thousand dollars (\$35,000), together with interest thereon at the rate of six per cent per annum from the 12th day of June, 1921, and said plaintiff's costs and disbursements, in which judgment, and the proceedings leading up to the same, certain errors were committed to the prejudice of said defendant, which more fully appear from the assignment if errors which is filed herewith, comes now and prays said Court for an order allowing the said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, under and according to the laws of the United States in that behalf made and provided, and also prays that an order be made fixing the amount of security which the said defendant shall give upon said writ of error, and that upon the furnishing of said security all further proceedings in this cause be suspended and staved until the determination of [412] said writ of error by said Circuit Court of Appeals for the Ninth Circuit. And further prays that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and your petitioner will ever pray.

Dated this 12th day of August, 1922.

S. A. KEENAN, Attorney for Defendant. Copy of within petition for order allowing writ of error received, and due service of same acknowledged this 12th day of August, A. D. 1922.

H. J. FITCH,

HAYDEN, LANGHORNE & METZGER, Attorneys for Plaintiff.

[Indorsed]: Aug. 12, 1922. [413]

No. 3437.

Petition for Order Allowing Writ of Error.

The said defendant, The Mutual Life Insurance Company of New York, a corporation, feeling itself aggrieved by the judgment entered in said cause on the 24th day of April, 1922, in favor of said plaintiff and against said defendant for the sum of Ten Thousand Dollars (\$10,000), together with interest thereon at the rate of six per cent per annum from the 12th day of June, 1921, and said plaintiff's costs and disbursements, in which judgment, and the proceedings leading up to the same, certain errors were committed to the prejudice of said defendant, which more fully appear from the assignment of errors which is filed herewith, comes now and prays said Court for an order allowing the said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, under and according to the laws of the United States in that behalf made and provided, and also prays that an order be made fixing the amount of security which the said defendant shall give upon said writ of error, and that upon the furnishing of said security all further proceedings in this cause be suspended and stayed until the determination of said writ of error by said Circuit Court of Appeals for the [414] Ninth Circuit. And further prays that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and your petitioner will ever pray.

Dated this 12th day of August, 1922. CHADWICK, McMICKEN, RAMSEY & RUPP,

Attorneys for Defendant.

Copy of within petition for order allowing writ of error received, and due service of same acknowledged this 12th day of August, A. D. 1922.

H. J. FITCH,

HAYDEN, LANGHORNE & METZGER, Attorneys for Plaintiff.

[Indorsed]: Aug. 12, 1922. [415]

No. 3436.

Order Granting Writ of Error and Fixing Amount of Bond.

This cause coming on this day to be heard in the courtroom of said court in the city of Tacoma, Washington, upon the petition of the defendant, Prudential Insurance Company of America, a cor-

poration, herein filed, praying the allowance of a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, together with the assignment of errors also herein filed, in due time, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

The Court having duly considered the same does hereby allow the said writ of error prayed for, and it is ORDERED that the amount of bond to be given by said defendant be and the same hereby is fixed in the sum of Forty [416] Thousand (\$40,000) Dollars.

Dated this 12th day of August, 1922.

EDWARD E. CUSHMAN,

Judge.

Copy of the foregoing order received and service of same acknowledged this 12th day of August, A. D. 1922.

H. G. FITCH,

HAYDEN, LANGHORNE & METZGER, Attorneys for Plaintiff.

[Indorsed]: Aug. 12, 1922. [417]

No. 3437.

Order Granting Writ of Error and Fixing Amount of Bond

This cause coming on this day to be heard in the courtroom of said court in the city of Tacoma, Washington, upon the petition of the defendant, The Mutual Life Insurance Company of New York, a corporation, herein filed, praying the allowance of a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, together with the assignment of errors, also herein filed, in due time, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

The Court having duly considered the same does hereby allow the said writ of error prayed for, and it is ORDERED that the amount of bond to be given by said defendant [418] be and the same hereby is fixed in the sum of Thirteen Thousand and no/100 Dollars.

Dated this 12th day of August, 1922. EDWARD E. CUSHMAN. Judge. Copy of the foregoing order received and service of same acknowledged this 12th day of August, 1922.

H. G. FITCH,
HAYDEN, LANGHORNE & METZGER,
Attorneys for Plaintiff.

[Indorsed]: Aug. 12, 1922. [419]

No. 3436.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, That we, Prudential Insurance Company of America, a corporation, the above-named defendant, as principal, and American Surety Company of New York, a body corporate duly incorporated under the laws of the State of New York and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto Maude E. Stewart, the above-named plaintiff, in the sum of Forty Thousand and no/100 Dollars, to be paid to said plaintiff, her executors, administrators and assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 12th day of August, 1922.

The condition of the above obligation is such that whereas in the above court and cause, final judgment was rendered against the said defendant and in favor of said plaintiff, in the sum of thirty-five thousand dollars (\$35,000) together with interest thereon at the rate of six per cent per annum from the 12th day of June, 1921, and said plaintiff's [420] costs and disbursements; and

WHEREAS, the said defendant has obtained from said Court a writ of error to reverse the judgment in said action, and a citation directed to the plaintiff is about to be issued citing and admonishing her to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at San Francisco, in the State of California;

NOW, THEREFORE, if the said defendant, Prudential Insurance Company of America, a corporation, shall prosecute the said writ of error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

PRUDENTIAL INSURANCE COMPANY OF AMERICA. (Seal)

[Seal]

By S. A. KEENAN,

Its Attorney.

AMERICAN SURETY COMPANY OF NEW YORK.

By S. H. MELROSE, Resident Vice-president.

[Seal]

Attest: B. L. WILEY,

Resident Assistant Secretary.

The sufficiency of the surety on the foregoing bond approved by me this 12th day of August, 1922.

EDWARD E. CUSHMAN, Judge of Said Court. [421] Copy of foregoing bond received and service of same acknowledged this 12th day of August, 1922.

H. G. FITCH,

HAYDEN, LANGHORNE & METZGER, Attorneys for Plaintiff.

[Indorsed]: Aug. 12, 1922. [422]

No. 3437.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, the Mutual Life Insurance Company of New York, a corporation, the above-named defendant, as principal, and United States Fidelity and Guaranty Co., a body corporate, duly incorporated under the laws of the State of Maryland, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto Maude E. Stewart, the above-named plaintiff, in the sum of Thirteen Thousand and no/100 Dollars to be paid to said plaintiff, her executors, administrators and assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 12th day of August, 1922.

The condition of the above obligation is such that whereas in the above court and cause, final judgment was rendered against the said defendant and in favor of said plaintiff, in the sum of Ten Thousand Dollars (\$10,000), [423] together with interest thereon at the rate of six per cent per annum from the 12th day of June, 1921, and said plaintiff's costs and disbursements; and

WHEREAS, the said defendant has obtained from said court a writ of error to reverse the judgment in said action, and a citation directed to the plaintiff is about to be issued citing and admonishing her to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at San Francisco, in the State of California;

NOW. THEREFORE, if the said defendant, The Mutual Life Insurance Company of New York, a corporation, shall prosecute the said writ of error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

> THE MUTUAL LIFE INSURANCE COM-PANY OF NEW YORK. (Seal)

> > By W. A. M. SMITH,

Its Agent.

By CHADWICK, McMICKEN, RAMSEY & RUPP,

Its Attorneys.

UNITED STATES FIDELITY AND GUARANTY CO.

[Seal] By JOHN C. McCOLLISTER, Attorney in Fact. The sufficiency of the surety on the foregoing bond approved by me this 12th day of August, 1922.

EDWARD E. CUSHMAN,

Judge of Said Court. [424]

Copy of the within bond received, and due service of same acknowledged this 12th day of August, 1922.

H. G. FITCH,
HAYDEN, LANGHORNE & METZGER,
Attorneys for Plaintiff.

[Indorsed]: Aug. 12, 1922. [425]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America to the Judges of the District Court of the United States for the Western District of Washington, Southern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said District Court before you, or some of you, between Maude E. Stewart, plaintiff, and Prudential Insurance Company of America, a corporation, defendant, a manifest error hath happened, to the great damage of the said Prudential Insurance Company of America, a corporation, defendant, as is said and appears by the complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that

then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justice of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said court in the City of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the 6th day of September, 1922, that the record and proceedings aforesaid being inspected the said justice of the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according [426] to the law and custom of the United States ought to be done.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 12th day of August, in the year of our Lord one thousand nine hundred and twenty-two, and of the Independence of the United States the one hundred and forty-seventh.

[Seal] F. M. HARSHBERGER,

Clerk of said District Court of the United States, for the Western District of Washington.

By Alice Huggins,

Deputy.

The foregoing writ is hereby allowed.

EDWARD E. CUSHMAN,

United States District Judge, for the Western District of Washington.

Copy of within writ of error received, and due service of same acknowledged this 12th day of August, 1922.

H. G. FITCH,
HAYDEN, LANGHORNE & METZGER,
Attorneys for Plaintiff.

Received copy of the foregoing writ of error lodged with me for defendant in error this 12th day of August, 1922.

F. M. HARSHBERGER, Clerk of said United States District Court. By Alice Huggins, Deputy.

[Indorsed]: Aug. 12, 1922. [427]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America to the Judges of the District Court of the United States for the Western District of Washington, Southern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said District Court before you, or some of you, between Maude E. Stewart, plaintiff, and The Mutual Life Insurance Company of New York, a corporation, defendant, a manifest error hath happened, to the great damage of the said The Mutual Life Insurance Company of New York, a corporation, defendant, as is said and appears by

the complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justice of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said court in the City of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the 9th day of September, 1922, that the record and proceedings aforesaid being inspected the said justice of the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according [428] to the law and custom of the United States ought to be done.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 12th day of August, in the year of our Lord one thousand nine hundred and twenty-two, and of the Independence of the United States the one hundred and forty-seventh.

[Seal] F. M. HARSHBERGER, Clerk of said District Court of the United States, for the Western District of Washington.

By Alice Huggins, Deputy. The foregoing writ is hereby allowed.

EDWARD E. CUSHMAN,

United States District Judge for the Western District of Washington.

Received copy of the foregoing writ of error lodged with me for defendant in error this 12th day of August, 1922.

F. M. HARSHBERGER,

Clerk of said United States District Court.

By Alice Huggins,

Deputy.

Copy of within writ of error received, and due service of same acknowledged this 12th day of August, 1922.

H. G. FITCH,

HAYDEN, LANGHORNE & METZGER,

Attorneys for Plaintiff.

[Indorsed]: Aug. 12, 1922. [429]

No. 3436.

Citation (On Writ of Error).
UNITED STATES OF AMERICA,—ss.

To Maude E. Stewart, GREETING:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in the city of San Francisco, State of California, on the 6th day of September, 1922, pursuant to a writ of error filed in the Clerk's office

of the District Court of the United States, for the Western District of Washington, Southern Division, wherein, Prudential Insurance Company of America, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated the 12th day of August, 1922.

EDWARD E. CUSHMAN,

United States District Judge for the Western District of Washington.

[Seal] Attest: F. M. HARSHBERGER, Clerk of said United States District Court for the Western District of Washington.

> By Alice Huggins, Deputy. [430]

We hereby, this 12th day of August, 1922, acknowledge service of the foregoing citation at the city of Tacoma, Washington.

H. G. FITCH,

HAYDEN, LANGHORNE & METZGER,

Attorneys for Said Maude E. Stewart.

Received copy of the foregoing citation lodged with me for defendant in error this 12th day of August, 1922.

F. M. HARSHBERGER,

Clerk of said United States District Court.

By Alice Huggins,

Deputy.

[Indorsed]: Aug. 12, 1922. [431]

No. 3437.

Citation (On Writ of Error).

UNITED STATES OF AMERICA,—ss.

To Maude E. Stewart, GREETING:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in the city of San Francisco, State of California, on the 9th day of September, 1922, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, for the Western District of Washington, Southern Division, wherein The Mutual Life Insurance Company of New York, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated the 12th day of August, 1922.

EDWARD E. CUSHMAN,

United States District Judge for the Western District of Washington.

[Seal] Attest: F. M. HARSHBERGER, Clerk of said United States District Court for the Western District of Washington.

> By Alice Huggins, Deputy. [432]

We hereby, this 12th day of August, 1922, acknowledge service of the foregoing citation at the city of Tacoma, Washington.

H. G. FITCH, HAYDEN, LANGHORNE & METZGER,

Attorneys for Said Maude E. Stewart.

Received copy of the foregoing citation lodged with me for defendant in error this 12th day of August, 1922.

F. M. HARSHBERGER,

Clerk of said United States District Court.

By Alice Huggins,

Deputy.

[Indorsed]: Aug. 12, 1922. [433]

No. 3436-No. 3437.

Stipulation for Consolidated Return to Writs of Error.

WHEREAS the above-entitled actions were consolidated for trial in the above-named court, and it was stipulated between the parties that the testimony adduced by either party to each of said actions should be applicable to both actions and that there should be one bill of exceptions for both actions; and

WHEREAS separate judgments were entered against the defendants in each of said actions, and the said defendants have deemed it necessary to take separate writs of error,

NOW, THEREFORE, to facilitate the preparation of the return to said writs and to expedite the hearing of said actions, it is hereby agreed that the clerk of said court [434] shall certify and transmit one consolidated record as his return to said writs of error in said actions.

Dated this 12th day of August, 1922.

H. G. FITCH,

HAYDEN, LANGHORNE & METZGER,

Attorneys for Plaintiff.

S. A. KEENAN,

Attorney for Defendant, Prudential Insurance Company of America.

CHADWICK, McMICKEN, RAMSEY & RUPP,

Attorneys for Defendant, The Mutual Life Insurance Company of New York.

[Indorsed]: Aug. 12, 1922. [435]

No. 3436-No. 3437.

Stipulation for Transmission of Original Exhibits.

In order to save expense, and because of the difficulty in obtaining a satisfactory copy of many of the original exhibits in the above-entitled causes.

IT IS HEREBY STIPULATED between the undersigned attorneys for the parties in said causes that none of the original exhibits on file with the Clerk, except Plaintiff's Exhibits 16 [436] and 17, need to be copied in the Transcript of Record, but that all such original exhibits shall

be transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 14th day of June, 1922.

H. G. FITCH and HAYDEN, LANGHORNE & METZGER, Attorneys for Plaintiff. CHADWICK, McMICKEN, RAMSEY & RUPP,

S. A. KEENAN,
Attorneys for Defendants.
[Indorsed]: Jun. 14, 1922. [437]

No. 3436—No. 3437.

Order for Transmission of Original Exhibits.

Agreeably to the written stipulation of the parties this day filed herein, and it being in the opinion of the presiding Judge, undersigned, deemed proper,

IT IS HEREBY ORDERED that none of the original exhibits except Plaintiff's Exhibit 16 and 17 need be copied in the transcript of record, but that all the original exhibits mentioned in said stipulation shall be forwarded by the Clerk of this court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 14th day of June, 1922. EDWARD E. CUSHMAN,

United States District Judge. [438]

[Indorsed]: Jun. 14, 1922. [439]

No. 3436-No. 3437.

Stipulation as to Transcript of Record.

It is hereby stipulated between the parties hereto that the clerk of this court in making up his consolidated return to the writs of error in said actions shall include therein the following:

Complaint in No. 3436.

Amendment to Complaint in No. 3436.

Answer in No. 3436.

Complaint in No. 3437.

Answer in No. 3437.

Stipulation for Consolidation in No. 3436.

Stipulation for Consolidation in No. 3437.

Order of Consolidation in No. 3436.

Order of Consolidation in No. 3437.

Notice to produce.

Opinion of the Court in consolidated causes.

Findings of fact and conclusions of Law proposed by defendant in No. 3436 and order refusing same [440] and allowing exceptions.

Findings of fact and conclusions of law proposed by defendant in No. 3437 and order refusing same and allowing exceptions.

Findings of fact and conclusions of law entered by the court in No. 3436.

Findings of fact and conclusions of law entered by the court in No. 3437.

Exceptions of Defendant to findings of fact and conclusions of law in No. 3436 and order allowing exceptions.

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Exceptions of defendant to findings of fact and conclusions of law in No. 3437 and order allowing exceptions.

Judgment entered in No. 3436.

Judgment entered in No. 3437.

Stipulation and order in consolidated causes extending time for bill of exceptions to May 26, 1922.

Stipulation extending time for bill of exceptions in consolidated causes to June 14, 1922.

Order extending time for bill of exceptions in consolidated causes, to June 14, 1922.

Motion of Defendants for settlement of bill of exceptions in consolidated causes, with affidavits of Otto B. Rupp and J. E. Peterson attached.

Affidavit of Otto B. Rupp (second affidavit) in rebill of exceptions.

Affidavit of H. G. Fitch in re bill of exceptions.

Bill of exceptions in consolidated causes.

Assignment of errors in No. 3436.

Assignment of errors in No. 3437. [441]

Petition for order allowing writ of error in No. 3436.

Petition for order allowing writ of error in No. 3437.

Order granting writ of error and fixing bond in 3436.

Order granting writ of error and fixing bond in 3437.

Bond in 3436.

Bond in No. 3437.

Writ of error in No. 3436.

Writ of error in No. 3437.

Citation in No. 3436.

Citation in No. 3437.

Stipulation for consolidated return to writs of error.

Stipulation for transmission of original exhibits.

Order for transmission of original exhibits.

This stipulation as to record.

Agreeably to the order of said Court heretofore entered in said consolidated causes, it is further stipulated between the parties that all of the original exhibits on file in said causes be detached from the bill of exceptions therein and transmitted by the Clerk of said court to said United States Circuit Court of Appeals for the Ninth Circuit as a part of his return to said writs of error, which exhibits are as follows:

PLAINTIFF'S EXHIBITS.

- Exhibit 1. Envelope containing deed from Stewart to McKenney.
- Exhibit 2. Envelope containing deed from Stewart and wife to Al. Maurer, also letter.
- Exhibit 3. Statement from Speedwell Garage Company, Portland.
- Exhibit 4. Prudential Insurance Policy No. 2023685.
- Exhibit 5. Prudential Insurance Policy No. 2230026.
- Exhibit 6. Prudential Insurance Policy No. 2371527. [442]
- Exhibit 7. Mutual Life Policy No. 2244868.
- Exhibit 8. Mutual Life Policy No. 2242058.

- Exhibit 9. Picture of Ferry-boat "Queen."
- Exhibit 10. Picture of Ferry-boat "Queen" at dock.
- Exhibit 11. Picture of Ferry-boat "Queen" and dock.
- Exhibit 12. Picture of Ferry-boat "Queen" along-side of "Elf."
- Exhibit 13. Picture of Ferry-boat "Queen."
- Exhibit 14. Picture of Ferry-boat "Queen" at dock.
- Exhibit 15. Carbon copy of a letter dated March 14, 1921, to Claude P. Hay and written report on bank annexed.
- Exhibit 16. Statement or letter written March 17, 1921, from Stewart to wife.
- Exhibit 17. Typewritten statement or letter from Stewart to wife dated March 15, 1921.
- Exhibit 18. Letter from Sardam to Mutual Life, dated April 9, 1921, with statement pertaining to proof of death.
- Exhibit 19. Letter from Sardam dated March 23, 1921, to Mutual Life.
- Exhibit 20. Letter from Prudential Insurance Company to Sardam.
- Exhibit 21. Affidavit of Mrs. Stewart dated May 9, 1921.
- Exhibit 22. Affidavit of Mrs. Stewart dated May 9, 1921.
- Exhibit 23. Shotswell's affidavit.
- Exhibit 24. Letter dated July 13, 1921, from Hayden, Langhorne & Metzger to Mutual Life Ins. Co.

- Exhibit 25. Letter dated May 13, 1921, from Fitch to Mutual Life Insurance Company.
- Exhibit 26. Letter dated May 13, 1921, from Fitch to Mutual Life Insurance Company.
- Exhibit 27. Letter from Sardam to Prudential Insurance Company dated March 23, 1921.
- Exhibit 28. Letter dated April 18, 1921, from Sardam to Prudential Insurance Company and claimant's statement on the Company's printed form. [443]
- Exhibit 29. Letter dated May 13, 1921, from Fitch to Prudential Insurance Company with affidavit of Mrs. Stewart and letter dated May 13, 1921, from Fitch to Prudential Insurance Company with affidavit of Mr. Stewart. Letter dated May 13, 1921, from Fitch to Prudential Ins Co.
- Exhibit 30. Affidavit of Paul Shotswell with letter from Hayden, Langhorne & Metzger to Prudential Insurance Company dated July 13, 1921.
- Exhibit 31. Letter from Hayden, Langhorne & Metzger dated July 14, 1921, to Prudential Insurance Company.
- Exhibit 32. Transcript of Walter Comber's conviction.
- Exhibit 33. Affidavit of George Elwood.
- Exhibits 34 and 35. (2 volumes) Registers of guests of Mr. Rainier Park.
- Exhibit 36. Picture of Stewart, his father and a boy.

DEFENDANTS' EXHIBITS:

Exhibit "A." Letter from Mrs. Stewart to Stevens.

- Exhibit "B." Picture of Ferry-boat "Queen."
- Exhibit "C." Picture of Ferry-boat "Queen."
- Exhibit "D." Rough sketch made on stand by Captain Reid.
- Exhibit "E." Photograph of Stewart.
- Exhibit "F." Photograph of Hanford Street scene.
- Exhibit "G." Photograph of Hanford Street scene.
- Exhibit "H." Photograph "C" referred to in Hanford depositions.
- Exhibit "I." Photograph "D" referred to in Hanford depositions.
- Exhibit "J." Photograph "E" referred to in Hanford depositions.
- Exhibit "K." Photograph "F" referred to in Hanford depositions.
- Exhibit "L." Photograph "G" refered to in Hanford depositions.
- Exhibit "M." Photograph "H" referred to in Hanford depositions.
- Exhibit "N." Photograph "I" referred to in Hanford depositions. [444]
- Exhibit "O." Two pages from Hanford Hotel Register.
- Exhibit "P." Bank check "K" referred to in Hanford depositions, dated February 14, 1922, signed by George Hedges payable to George Elwood.
- Exhibit "Q." Photograph "A" referred to in Pooley deposition.

Exhibit "R." Photograph referred to in Pooley deposition.

Exhibit "S." Telegram from Sardam to Langhorne.

Exhibit "T." Photograph "I" referred to in Onorato deposition.

Exhibit "U." Plat of dock street, etc., at Kalama.

Exhibit "V." Photograph referred to in Comber deposition.

Exhibit "W." Photograph referred to in Comber deposition.

Exhibit "X." Photograph of boats "log."

Exhibit "Y." Diagram of Ferry-boat "Queen's" deck.

Exhibit "Z."—Photograph.

It is further stipulated between the parties hereto that the foregoing compromise all the papers, exhibits, testimony and proceedings which are necessary to the hearing of said consolidated causes upon such writs of error in the United States Circuit Court of Appeals for the Ninth Circuit, and that no other papers or proceedings than those above mentioned need be included by the Clerk of said Court in making up his return to said writs of error as a part of such record.

Dated: August, 1922.

H. G. FITCH,
HAYDEN, LANGHORNE & METZGER,
Attorneys for Plaintiffs.
S. A. KEENAN.

Attorney for The Prudential Insurance Company of America.

CHADWICK, McMICKEN, RAMSEY & RUPP,

Attorneys for Defendant The Mutual Insurance Company of New York. [445] [Indorsed]: Aug. 15, 1922. [446]

No. 3436-No. 3437.

Stipulation Re Printing Transcript of Record.

It is hereby stipulated and agreed by the parties to the above-entitled causes, through their respective counsel, that the consolidated printed transcript therein consists of the following, it being deemed by all parties that the same comprises all parts of the record in anywise material to the consideration of said causes in the Circuit Court of Appeals in reviewing said causes on the writs of error sued out therein, to wit;

1. Plaintiff's complaint in No. 3436, omitting therefrom the exhibits designated therein as "A," "B," and "C," being the three policies of insurance sued on, excepting the first page, in full, of each of said policies of insurance. It being agreed by all parties to these ac-

tions that the first page of the respective policies of insurance is the only part of the policy in anywise involved in this litigation. [447]

- 2. Amendment to complaint in No. 3436.
- 3. Defendant's answer in No. 3436.
- 4. Plaintiff's complaint in No. 3437, omitting therefrom the exhibits designated therein as "A" and "B," being the two policies of insurance sued on, excepting the first page, in full, of each of said policies of insurance. It being agreed by all parties to these actions that the first page of the respective policies of insurance is the only part of the policy in anywise involved in this litigation.
- 5. Defendant's answer in No. 3437.
- 6. Notice to produce.
- 7. Stipulation for consolidation in No. 3436.
- 8. Stipulation for consolidation in No. 3437.
- 9. Order of consolidation in No. 3436.
- 10. Order of consolidation in No. 3437.
- 11. Opinion of the Court in consolidated causes.
- 12. Findings of fact and conclusions of law proposed by defendant in No. 3436, and order refusing same and allowing exceptions.
- 13. Findings of fact and conclusions of law proposed by defendant in No. 3437, and order refusing same and allowing exceptions.
- 14. Findings of fact and conclusions of law entered by the Court in No. 3436.
- 15. Findings of fact and conclusions of law entered by the Court in No. 3437.

- 410 Prudential Ins. Co. of America et al.
- 16. Exceptions of defendant to findings of fact and conclusions of law in No. 3436, and order allowing exceptions.
- 17. Exceptions of defendant to findings of fact and conclusions of law in No. 3437, and order allowing exceptions.
- 18. Judgment entered in No. 3436.
- 19. Judgment entered in No. 3437.
- 20. Stipulation and order in consolidated causes extending time to file bill of exceptions to May 26, 1922.
- 21. Stipulation extending time for preparation of bill of exceptions in consolidated causes to June 14, 1922.
- 22. Order extending time for bill of exceptions in consolidated causes to June 14, 1922. [448]
- 23. Motion of defendants for settlement of bill of exceptions in consolidated causes, with affidavit of Otto B. Rupp and J. E. Peterson attached.
- 24. Affidavit of Otto B. Rupp (second affidavit) in re bill of exceptions.
- 25. Affidavit of H. G. Fitch in re bill of exception
- 26. Bill of exceptions in consolidated causes, excepting all exhibits attached thereto, the number of said exhibits to be included in the printed record, as hereinafter specifically set out.
- 27. Assignment of errors in No. 3436.
- 28. Assignment of errors in No. 3437.
- 29. Petition for allowing writ of error in No. 3436.

- 30. Petition for allowing writ of error in No. 3437.
- 31. Order granting writ of error and fixing bond in No. 3436.
- 32. Order granting writ of error and fixing bond in No. 3437.
- 33. Bond in No. 3436.
- 34. Bond in No. 3437.
- 35. Writ of error in No. 3436.
- 36. Writ of error in No. 3437.
- 37. Citation in No. 3436.
- 38. Citation in No. 3437.
- 39. Stipulation for consolidated return to writs of error.
- 40. Stipulation for transmission of original ex-, hibits.
- 41. Order for transmission of original exhibits.
- 42. Stipulation as to record.

And the following exhibits:

PLAINTIFF'S EXHIBITS:

- 43. Exhibit 1. Envelope containing deed from Stewart to McKenney.
- 45. Exhibit 3. Statement from Speedwell Garage Company. Portland.
- 46. Exhibit 4. First page only of Prudential Insurance Policy No. 2023685.

- 412 Prudential Ins. Co. of America et al.
- 47. Exhibit 5. First page only of Prudential Insurance Policy No. 2230026.
- 48. Exhibit 6. First page only of Prudential Insurance Policy No. 2371527.
- 49. Exhibit 7. First page only of Mutual Life Policy No. 2244868.
- 50. Exhibit 8. First page only of Mutual Life Policy No. 2242058.
- 51. Exhibit 9. Picture of Ferry-boat "Queen."
- 52. Exhibit 11. Picture of Ferry-boat "Queen" and dock.
- 53. Exhibit 12. Picture of Ferry-boat "Queen" alongside "Elf."
- 54. Exhibit 15. Carbon copy of letter dated March 14, 1921, to Claude P. Hay and written report on bank annexed.
- 55. Exhibit 16. Statement or letter written March 17, 1921 from Stewart to wife.
- 56. Exhibit 17. Typewritten statement or letter from Stewart to wife, dated March 15, 1921.
- 57. Exhibit 18. Letter from Sardam to Mutual Life, dated April 9, 1921, with statement pertaining to proof of death.
- 58. Exhibit 19. Letter from Sardam to Mutual Life, dated March 23, 1921.
- 59. Exhibit 20. Letter from Prudential Insurance Company to Sardam.
- 60. Exhibit 21. Affidavit of Mrs. Stewart, dated May 9, 1921. (Immediately following this affidavit print this:) It is admitted by all parties that a similar affidavit was forwarded, at the same time, to the Prudential

Insurance Company for each of its three policies involved in this suit and that policy was referred to and described therein. It is also admitted by all parties that a similar affidavit, at the same time, was forwarded to the Mutual Life Insurance Company for each of its two policies involved in this suit and that policy was referred to and described therein, and this affidavit need be printed but once. [450]

- 61. Exhibit 23. Shotswell's Affidavit. (Immediately following this affidavit print:) It is admitted by all parties that this affidavit was forwarded to and received by each of the Insurance Companies, and need be printed but once.
- 62. Exhibit 24. Letter dated July 13, 1921, from Hayden, Langhorne & Metzger to Mutual Life Insurance Company. (Immediately following this letter print:) It is admitted that the same letter was forwarded to and received by the Prudential Insurance Company, and need be printed but once.
- 63. Exhibit 27. Letter from Sardam to Prudential Insurance Company dated March 23, 1921.
- 64. Exhibit 28. Letter dated April 18, 1921, from Sardam to Prudential Insurance Company and claimant's statement on Company's printed form.
- 65. Exhibit 29. Letter dated May 13, 1921, from Fitch to Prudential Insurance Company.

- 414 Prudential Ins. Co. of America et al.
 - (Immediately following this letter print:) It is admitted that a similar letter was forwarded to the Prudential Insurance Company for each of its three insurance policies, and need be printed but once.
- 66. Exhibit 31. Letter from Hayden, Langhorne & Metzger, dated July 14, 1921, to Prudential Insurance Company.
- 67. Exhibit 32. Transcript of Walter Comber's conviction.
- 68. Exhibit 33. Affidavit of George Elwood.
- 69. Exhibits 34 and 35 are two large volumes of registered guests entering Mt. Rainier Park. It is stipulated that they need not be printed in this record, and it is further admitted, by all parties hereto, that neither the name nor signature of Frederick L. Stewart, in any form, appears therein.
- 70. Exhibit 36. Picture of Stewart, his father and a boy.

DEFENDANTS' EXHIBITS:

- 71. Exhibit "A." Letter from Mrs. Stewart to Stevens.
- 72. Exhibit "E." Photograph of Stewart.
- 73. Exhibit "F." Picture of barber-shop, Hanford.
- 74. Exhibit "H." Photograph of Stewart annexed to Hanford Depositions.
- 75. Exhibit "I." Photograph of Stewart referred to in Hanford Depositions. It is admitted by all parties that exhibits "H" and "I" [451] are the same photographs

that were identified by, and referred to in the testimony of, the witnesses who testified by deposition at San Francisco, Hanford, Riverside and San Diego, being pictures of the man each claimed to have seen, and for that reason they need not be reproduced in this record.

- 76. Exhibit "J." Picture of Olympic Cafe at Hanford.
- 77. Exhibit "O." Two pages from Hanford Hotel Register.
- 78. Exhibit "P." Bank check from Hedges to Elwood.
- 79. Exhibit "S." Telegram from Sardam to Langhorne.
- 80. Exhibit "X." Photograph of boats "logs."
- 81. Exhibit "Y." Diagram of Ferry-boat "Queen's" deck.
- 82. This stipulation.

It is hereby stipulated and agreed that this printed record be printed under the supervision of the Clerk of the Circuit Court of Appeals, Ninth Circuit, at San Francisco, California, and expressly waive the provisions of the act of February 13, 1911, relative to the District Court having supervision thereof.

It is hereby further stipulated and agreed by and between all the parties to these actions, in the printing of this record, that all titles, captions, jurats, and verifications be omitted. 416 Prudential Ins. Co. of America et al.

Dated at Tacoma, Washington, August 22, 1922. H. G. FITCH and

HAYDEN, LANGHORNE and METZGER, Attorneys for Plaintiff.

S. A. KEENAN,

Attorney for Defendant, The Prudential Insurance Company.

CHADWICK, McMICKEN, RAMSEY & RUPP,

Attorneys for Defendant, Mutual Life Insurance Company.

[Indorsed]: Aug. 22, 1922. [452]

No. 3436-No. 3437.

Certificate of Clerk U. S. District Court to Transcript of Record, Etc.

United States of America, Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify the within typewritten pages numbered from 1 to 448, inclusive, to be a full, true and correct copy of so much of the record, papers, testimony and proceedings in the foregoing entitled consolidated causes as are necessary to the hearing of said causes on writs of error therein in the United States Circuit Court of Appeals for the Ninth Circuit and as is stipulated for by counsel of record therein, as the same remain of record and on file in the office of the clerk of said District

Court, and that the same, together with all of the original exhibits in said causes, referred to in stipulation [453] between the parties thereto filed therein August 15, 1922, which original exhibits are transmitted herewith pursuant to the order of the court so directing, constitute the consolidated record on return to said writs of error herein from the judgments of said United States District Court for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that I hereto attach and herewith transmit the original writs of error and original citations issued in said respective causes.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the plaintiff in error for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit.

	Herk's fees (Sec. 828, R. S. U. S.) for mak-
	ing record and return, 1417 folios at
210.85	15ϕ each
	ertificate of Clerk to Transcript, four folios
.60	at 15ϕ each
.20	ertificate of Clerk

ATTEST my official signature and the seal of said District Court at Tacoma, this 22d day of August, A. D. 1922.

[Seal]

F. M. HARSHBERGER,

Clerk.

By Ed. M. Lakin, Deputy Clerk. [454]

[Endorsed]: No. 3918. United States Circuit Court of Appeals for the Ninth Circuit. The Prudential Insurance Company of America, a Corporation, and Mutual Life Insurance Company of New York, a Corporation, Plaintiffs in Error, vs. Maude E. Stewart, Defendant in Error. Transcript of Record. Upon Writs of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed August 26, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE PRUDENTIAL INSURANCE COM-PANY OF AMERICA, a corporation, and MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,

Plaintiffs in Error,

No. 3918

VS.

MAUDE E. STEWART,

Defendant in Error.

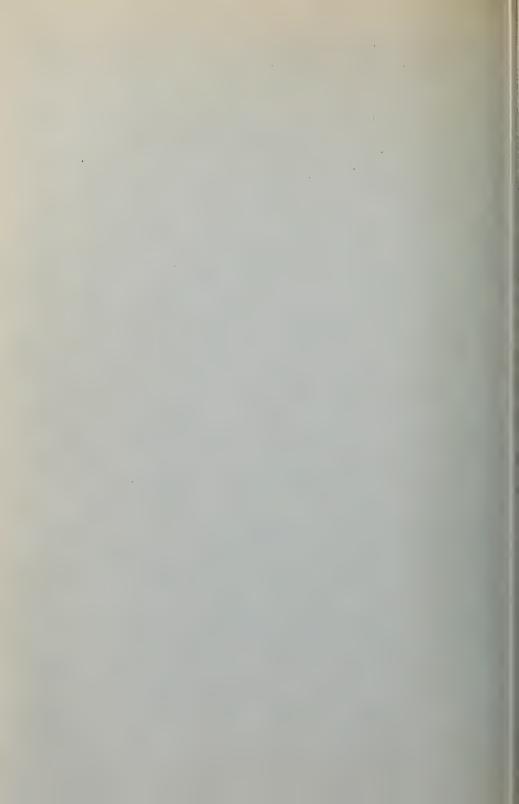
Upon Writs of Error From the United States
District Court for the Western District
of Washington, Southern Division

BRIEF FOR PLAINTIFFS IN ERROR

S. A. KEENAN, CHADWICK, McMICKEN, RAMSEY & RUPP, ATTORNEYS FOR PLAINTIFFS IN ERROR

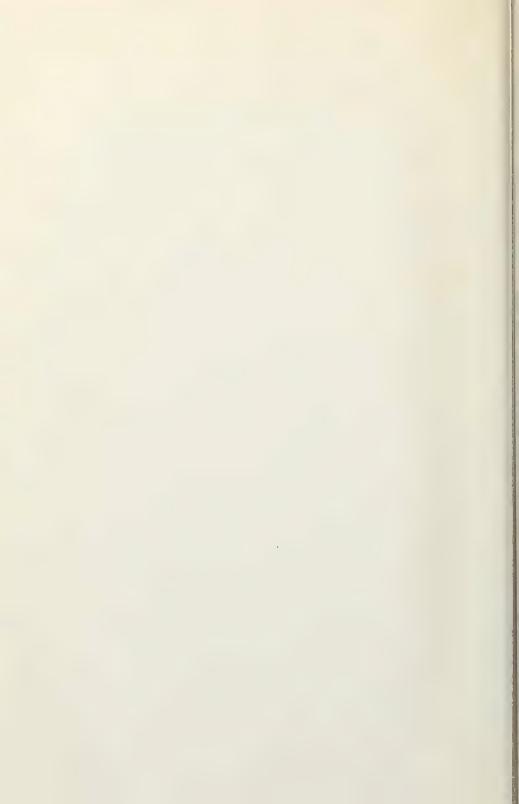
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SEATTLE, WASHINGTON.



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In the United States Circuit Court of Appeals

For the Ninth Circuit

THE PRUDENTIAL INSURANCE COM-PANY OF AMERICA, a corporation, and MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,

Plaintiffs in Error,

No. 3918

VS.

Maude E. Stewart,

Defendant in Error.

Upon Writs of Error From the United States
District Court for the Western District
of Washington, Southern Division

BRIEF FOR PLAINTIFFS IN ERROR

PRELIMINARY STATEMENT

On July 25th, 1921, an action was brought by Maude E. Stewart, Defendant in Error, against the Prudential Insurance Company of America upon three insurance policies on the life of Frederick L. Stewart, her husband, payable to her as sole beneficiary; one was issued August 17, 1915,

for \$5,000; one was issued August 7, 1916, for \$5,000, and the other was issued April 17, 1917, for \$25,000. At the same time, defendant in error brought another action against the Mutual Life Insurance Company of New York upon two insurance policies on the life of Frederick L. Stewart, her husband, payable to her as sole beneficiary; first policy was issued on July 15, 1915, for \$5,000; the other policy was issued July 28, 1915, for \$5,000. Both actions were brought in the United States District Court, for the District of Washington, Western District, Southern Division. After issues were joined in both cases, all parties thereto joined in a written stipulation, with the approval of the judge of the District Court, for the consolidation of the cases, for the purpose of trial, and they were so tried. A further stipulation was entered into by all parties to said actions waiving the right of trial by a jury, and the cases were so tried. Findings of Fact, Conclusions of Law, and Judgment thereon were entered by the Court on April 24, 1922, in favor of Defendant in Error and against the Plaintiffs in Error.

Thereafter, each of the said Insurance Companies sued out separate Writs of Error, but, by

written stipulation of all parties to said actions, it was agreed that in the perfection of the record in this court, only one Bill of Exceptions need be prepared, one Transcript and one Printed Record.

STATEMENT OF FACTS

For many years, Frederick L. Stewart was engaged in the banking business at Kelso, Wash-His bank was in an insolvent condition for at least ten years before his disappearance, although this precarious condition of the institution was not known in the community. The banking department of the State was cognizant of the bad condition of the bank for many years before Stewart disappeared. Stewart was aware of this knowledge on the part of the banking department but manifested no particular worry or anxiety on that account. In November, 1920, the state banking department made an examination, finding the bank in a very bad condition, notifying Stewart that the conditions in the bank must be changed. It appears that the requests were not, or could not be, complied with. On March 6, 1921, the banking department notified Stewart to come before the department at Olympia and he did so at once. Stewart was then notified by the banking department that he must resign as Cashier and

officer of the bank. He returned home, continued the operation of the bank without resigning until the 17th day of March, 1921, when the banking department took the bank over. The immediate reason for the banking department taking charge of the bank then was on account of a written report of its condition being forwarded by one Louis Plamondon to the department showing its hopeless insolvency. In response to that report, one Claude P. Hay, of the banking department came to Kelso on the 16th day of March, 1921, and in conjunction with Frederick L. Stewart, Louis Plamondon and the President of the bank, they remained in conference in the banking rooms until about two o'clock in the morning of March 17th. Hay did not then take charge of the bank, but suggested to Stewart that Stewart go with him to Portland that morning and see if the latter could not raise sufficient funds to guide the bank along without closing it. Their trip to Portland, for that purpose, was unsuccessful. About ten o'clock in the morning of March 17, Claude P. Hay informed Stewart that he (Hay) must return to Kelso and take charge of the bank which he did at about twelve o'clock that day. Stewart remained in Portland until about six o'clock that evening when he took the passenger train that goes from Portland to Astoria, Oregon. Between these two points, the train passes through St. Helens, Goble and Rainier, in the order named. When Stewart and Hay left for Portland in the morning, other citizens of Kelso also went to Portland on the same train, and all expected to return on the six o'clock train to Rainier, taking a ferryboat there across the Columbia River and up the Cowlitz River to Kelso. The other Kelso citizens returned home by that train and by that ferryboat. Stewart got off at St. Helens and immediately employed an automobile to take him to Goble, arriving in the latter place just as the train, from which he dismounted, arrived there. He paid the automobile driver, introduced and made himself known and then remarked that he was going to a telephone to talk with his wife at Kelso. He went to the 'phone, and called up his house, the call being answered by a man by the name of Sardam. He did not talk with his wife nor ask to talk with her. He then went to the ferryboat Queen, got aboard to go across the Columbia River to Kalama. The Captain of the ferryboat and the man who acted as purser, testified that Stewart did not get off at Kalama. Beginning the next morning, and continuing for more than two weeks, the river was dragged by all modern devices by several boats for the purpose of recovering his body. The body has never been recovered. A grip or handbag was left in the pilot house by Stewart, the brief case that he was carrying disappeared with him from the boat. Some time prior to March 17th, 1921, Stewart wrote his wife a letter or a statement which was found in the bank after his disappearance, giving her certain instructions and making some requests as to the payment of the insurance money. In this letter he intimated that "something might happen to him." He wrote another letter, dated March 17, 1921, evidently written at Portland, almost identical in language with the one written on the 15th. Aside from the intimations in both these letters, the record does not disclose that he ever stated to his friends or others that he contemplated suicide. On the 17th day of March, 1921, he had in full force and effect \$86,000 insurance on his life, and \$50,000 accident insurance. The trial of the actions proceeded upon the admitted theory by the plaintiff that he did not accidentally meet his death but did deliberately drown himself in the Columbia River.

Not only was the Kelso Bank insolvent but Stewart, individually, was also insolvent. Not only so but he was, in addition, an embezzler of the funds of at least one estate for which he was administrator and he "faced criminal prosecutions from a dozen different sources."

THE PLEADINGS

The complaints were in the ordinary form, making copies of the policies a part thereof, and praying judgment for the full amount of each policy.

The answers admitted the due execution of the policies, and that all premiums were fully paid on March 17th, 1921. Each denied the receipt of proofs of death, and denied the death of the insured.

No substantial evidence to support judgment in favor of Defendant in Error.

At the close of all the evidence offered by all parties to the actions, Plaintiffs in Error, duly challenged the substantiality of the evidence to justify findings or judgment in favor of Defendant in Error and prayed for the dismissal of the actions. They likewise challenged the sufficiency of the attempted proofs of death offered by beneficiary before suits were brought.

SPECIFICATIONS OF ERROR RELIED UPON

Plaintiffs in Error contend that the lower court erred in the following particulars:

- 1. In permitting the witness Claude P. Hay, the bank examiner, to testify, in substance, as follows: I closed the bank, I found arms, pistols and a sawed-off shotgun. I unloaded them because I wanted to remove any opportunity that Mr. Stewart might have to do anything rash. I was a little concerned as to what he might do.
- 2. In permitting said witness to testify as follows: Plamondon called me up and asked me to come down to his house. When I stepped on the porch at Mr. Plamondon's house, the door was opened and as I stepped in he said, "Well, Fred has done it." I said, "Did he shoot himself?" and he said, "No, he went in the river."
- 3. In permitting H. E. McKenney to testify, in substance, to the financial condition of Stewart's estate, as shown by the probate proceedings.
- 4. In permitting the witness George F. Plamondon to testify, in substance, that he told the bank examiner, Hay, that Stewart made away with himself.

At the time the testimony was offered, as referred to in the preceding numbers, 1, 2, 3 and 4, defendant duly objected, an exception was taken and allowed.

- 5. In admitting and receiving in evidence plaintiff's Exhibit "20," being the affidavit of Maude E. Stewart concerning her so-called proof of death under the policy issued by the Mutual Life Insurance Company of New York, over the objection of defendant to which an exception, at the time, was allowed.
- 6. In admitting and receiving in evidence, over the objection of defendant, Exhibit "21" to which objection an exception was allowed.
- 7. In admitting and receiving in evidence the letter of Sardam and the so-called proofs of death submitted by Mrs. Stewart regarding the policies issued by the Mutual Life Insurance Company of New York, all included in plaintiff's Exhibit "18," to the offer of which defendant, at the time, objected, the objection being overruled and an exception was duly allowed.
- 8. In admitting and receiving in evidence the letter of March 23, 1921, by Sardam to the Mutual Life Insurance Company to which the de-

fendant, at the time, objected, the objection being overruled and an exception was duly allowed.

- 9. In admitting and receiving in evidence plaintiff's Exhibit "22" being the affidavit of Maude E. Stewart and her so-called proof of death under policies issued by the Mutual Life Insurance Company of New York to the introduction and reception of which, at the time, defendant objected and the objection being overruled and an exception was duly allowed.
- 10. In admitting and receiving in evidence plaintiff's Exhibit "23," the affidavit of Paul G. Shotswell, the offer of which was objected to, at the time, the objection being overruled and an exception was duly allowed.
- 11. In admitting and receiving in evidence plaintiff's Exhibit "24," being the letter from Hayden, Langhorne & Metzger, concerning proof of death, to the offer of which defendant, at the time, objected, the objection being overruled and an exception was taken and duly allowed.
- 12. In admitting and receiving in evidence plaintiff's Exhibit "25," being the letter of H. G. Fitch, to which defendant, at the time, objected, the objection being overruled and an exception was duly allowed.

- 13. In admitting and receiving in evidence the letter of F. J. Sardam, March 23, 1921, being plaintiff's Exhibit "27," to the offer of which defendant at the time objected, the objection being overruled and an exception was duly allowed.
- 14. In admitting and receiving in evidence plaintiff's Exhibit "28," being the original letter of April 18, 1921, by Sardam to the Prudential Insurance Company, and so-called certificates of proof of death signed by Maude E. Stewart, to the offer and reception of which defendant, at the time, objected, objection being overruled and an exception was duly allowed.
- 15. In admitting and receiving in evidence plaintiff's Exhibit "29," being three affidavits signed by Maude E. Stewart and a letter from Fitch, dated May 13, 1921, to which offer the defendant, at the time, objected, the objection being overruled and an exception was duly allowed.
- 16. In admitting and receiving in evidence plaintiff's Exhibit "30," being the original affidavit of Paul G. Shotswell, also letters of Hayden, Langhorne & Metzger, to which offer defendant, at the time, objected, the objection being overruled and an exception was duly allowed.

- 17. In admitting and receiving in evidence plaintiff's Exhibit "31," letter of July 14, 1921, written by Hayden, Langhorne & Metzger, to the offer of which defendant at the time objected, the objection being overruled and an exception was duly allowed.
- 18. In admitting and receiving in evidence all written statements, memoranda and other papers, annexed to or made a part of all the foregoing instruments offered and received in evidence to all of which at the time defendant first duly objected, the objection being overruled and an exception was allowed in each instance.
- 19. In overruling the motion of defendant, at the close of the trial and after the reception of all testimony for the dismissal of said action upon the grounds, first, that there was no due or satisfactory proof of death presented to defendant on either of its policies prior to the commencement of the action, or at any time; second, that upon the whole case the evidence was insufficient to justify the conclusion that Frederick L. Stewart was dead, that the evidence in the case did show that Stewart is living, which motion was overruled and at the time an objection to said ruling was duly taken and an exception allowed.

- 20. The court erred in its oral opinion at the close of the cause holding that Frederick L. Stewart was dead and in further holding that the plaintiff in the cause was entitled to judgment against the defendant.
- 21. The court erred in making special Finding of Fact "X," to which finding defendant at the time and in writing objected, the objection was overruled and an exception allowed.
- 22. The court erred in making special Finding of Fact "XI," to which finding defendant at the time and in writing objected, the objection was overruled and an exception allowed.
- 23. The court erred in its special Conclusion of Law No. "II," which conclusion of law was objected to at the time by defendant, said objection was overruled and an exception duly allowed.
- 24. The court erred in its special Conclusion of Law No. "III," which conclusion of law was objected to at the time by defendant, said objection was overruled and an exception duly allowed.
- 25. The court erred in refusing to make Findings of Fact in favor of defendant as proposed by defendant at the time and prior to its making findings in this case, which proposed

findings of fact are in writing numbered from one to six, which proposed findings of fact and each of them were, at the time, overruled by the court and an exception duly allowed to defendant for the court's ruling upon each of said proposed findings of fact.

- 26. The court erred in failing to adopt the conclusions of law numbered one and two as proposed in writing by defendant prior to his making findings and conclusions in the case, which proposals were at the time overruled by the court and an exception to such rulings being duly allowed.
- 27. The court erred in signing and entering judgment in said cause against defendant in said case.

FINAL ISSUES IN THIS COURT.

The above errors may be grouped for the purpose of simplifying the argument into three fundamental questions which, therefore, become the main issues in this Court.

Thus:

ERRORS 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 become

ISSUE I. Were the papers and documents submitted to Plaintiffs in Error before suits were brought, "due proof of the death of Stewart"?

ERRORS 1, 2 and 4 become

ISSUE II. Did the Honorable Trial Court err in admitting evidence concerning the emotions, conclusions and feelings of third parties upon hearing of Stewart's disappearance?

ERRORS 19, 20, 21, 22, 23, 24, 25, 26, 27, become

ISSUE III. Did the Honorable Trial Court err in concluding the issue in favor of Defendant in Error as disclosed by his oral decisions at close of trial, Findings of Fact and Conclusions?

POINTS AND AUTHORITIES

ISSUE I.

Papers and documents submitted did not constitute "due proof of the death of the insured" as required by the Prudential Policies, nor "due proof of the death of Frederick L. Stewart" as required by the Mutual Life Insurance Policies.

POINT 1.

Sufficiency in form only is admitted by accepting and retaining the proofs without objection. The truth of the statements contained in the proofs is not thereby admitted.

Crotty v. Union Mut. L. Ins. Co., 144 U. S. 621.

At all times, Plaintiffs in Error denied liability solely on the ground that Stewart is not dead.

POINT 2.

The question as to the sufficiency of the preliminary proofs of death, in this case, is purely a question of law.

Continental Life Ins. Co. v. Searing, 240 Fed. 653.

Security Bank of Richmond v. Equitable L. Assn., 112 Va. 462; 71 S. E. 647.

None of the papers or documents mailed as preliminary proofs of death and received in evidence over defendants' objections threw any light whatsoever on the alleged death of Stewart, except plaintiff's Exhibit "23," being the affidavit of Shotswell, the purser on the boat. Stripped of all detail, Shotswell's affidavit merely states: That he was purser on the boat, he collected the fare from Stewart. When half way across the river and when a half mile from the Kalama dock, Stewart went into the passenger cabin, that was the last he saw of Stewart. That he watched the other passengers get off the boat at Kalama, and knows that Stewart did not get off at that time. If he had gotten off, he would have seen him. That after the other passengers got off, he informed Captain Pomerov that Stewart did not get off the boat and then he and Pomeroy "went back and looked through the boat, affiant going around one side and Pomeroy on the other." They found Stewart's bag in the pilot house. All the other papers and documents delivered to the companies, in no manner, support Shotswell's affidavit. Therefore, the only attempt made to prove to the companies that Stewart's life had ceased, is this affidavit of Shotswell. This affidavit must be read, of course, in conjunction with a letter of counsel for Defendant in Error written to the insurance companies in which letter it was stated that Stewart faced criminal prosecutions from a dozen sources.

So read, we think it clear under the authority of Ashbury v. Sanders, 8 Cal. 62, 68 Am. Dec. 300, that due proof of death was never furnished to plaintiffs in error.

ISSUE II.

Did the Honorable Trial Court err in admitting the evidence objected to in assigned Errors 1, 2, and 4?

POINT 1.

Under this point, we complain of the admission in evidence of certain statements made by the witnesses Hay and Plamondon at the time they were told of the disappearance of Stewart

and the admission in evidence of the testimony of Hav that when he returned to Kelso at noontime on March 17th he unloaded all the guns and pistols in the banking house of the Kelso bank. This evidence was offered under the theory that it was a part of the res gestae. It needs no citation of authority, we think, to show its inadmissibility for that purpose. When Hay and Plamondon were informed of the disappearance or alleged death of Stewart, they were in the City of Kelso, a place some miles distant from the Columbia River. We quite agree that the statements of bystanders at an accident are sometimes admissible. but these men were not by-standers at the scene of an accident; they were miles away and whatever had occurred had occurred some considerable time before. Their statements were not therefore statements arising from shock. Moreover, it is manifest that the action of Hay somewhere around noon of March 17th in unloading guns is not under any conceivable theory to be considered a part of an occurrence which happened some nine hours later. Nor was this evidence admissible on the theory that it was proof of a predisposition on Stewart's part to commit suicide.

It would probably have been proper to have shown in the case that Stewart himself had told others that he intended to commit suicide provided such statement was made shortly before March 17th, but, we utterly fail to see how what two men, to whom Stewart had never made any such communication, said on the night of March 17th, can be considered the equivalent of a statement by Stewart.

ISSUE III.

The Trial Court erred in finding for the defendant in error.

POINT I.

SUICIDE.

At the beginning of the trial counsel for defendant in error stated that the case would be tried on the theory that Stewart voluntarily ended his own life and upon that theory the case was tried. It will not, we think, be denied that when the death is admitted but the cause thereof is in doubt, whether accident, self-destruction or some other cause, the presumption is all against suicide. It is held that in such a case the presumption of love of life is so strong that it has the force of affirmative evidence and in order to overcome that evidence one claiming that suicide was the cause of death must introduce proof which will exclude every

reasonable hypothesis other than that of suicide as the cause of death.

Out of the legion of cases so holding we cite and quote from only a few.

In Travellers' Ins. Co. v. McConkey, 227 U. S. 661, the trial judge charged the jury as follows:

"It is manifest that self-destruction cannot be presumed. So strong is the instinctive love of life in the human breast and so uniform the efforts of men to preserve their existence, that suicide cannot be presumed."

The correctness of this instruction, among others, having been challenged, the United States Supreme Court in passing on the point said:

"In respect to the issue as to suicide, the court instructed the jury that self-destruction was not to be presumed. In *Mallory v. Travellers' Ins. Co.* 47 N. Y. 52, 54, which was a suit upon an accident policy, it appeared that the death was caused either by accidental injury or by the suicidal act of the deceased. 'But,' the court properly said, 'the presumption is against the latter. It is contrary to the general conduct of mankind; it shows gross turpitude in a sane person.'"

In Neasham v. New York Life Ins. Co., 244 Fed. 556, the court said:

"Primarily the presumption is against self-destruction, and it is one of the *strongest* presumptions with which courts have to deal. Being, as it is,

entirely opposed to natural instinct to deliberately take one's own life, the fact will never be inferred unless the evidence is such as to fairly exclude every other reasonable hypothesis as to the cause of death. Of course the presumption will not prevail against clear and definite proof; but if the circumstances are consistent with any other reasonable theory, the latter must be adopted to the exclusion of that of suicide. These principles have become axiomatic in their application."

In the case of Lindahl v. Supreme Court I. O. F., 100 Minn. 87, 110 N. W. 358, 8 L. R. A. (N. S.) 916, 117 A. S. R. 666, it appears that the lower court instructed the jury:

"In this class of cases the rule is that every reasonable hypothesis for accounting for death other than suicide should be excluded from the case before you can conclude that it was suicide and then only of course from evidence warranting that conclusion."

The Supreme Court of Minnesota held that this instruction was correct, saying:

"The issue being the fact of suicide, it is for the defendant to prove this ultimate fact by a fair preponderance of the evidence. It starts with the burden of overthrowing the presumption that a person does not voluntarily destroy what is commonly regarded as the most precious of all possessions, life itself. When the fact of death appears, the law presumes that it must have resulted from causes which were not voluntarily brought about by the deceased. Death may result from innumerable causes. The facts of a case may suggest accidental shooting, poi-

soning or drowning. If the evidence is consistent with the theory of either, the presumption which the law raises from known and recognized controlling forces of human nature requires the conclusion that the death was accidental. If the known facts are consistent with a cause of death which does not involve self-destruction, that cause must be accepted. After all the hypothesis which are consistent with an innocent or accidental death are eliminated, the conclusion of suicide may then be drawn. The burden is upon the defendant to show that the circumstances and conditions are inconsistent with any other reasonable cause of death than that of suicide: that is, it must eliminate and disprove all other causes of death which are consistent with the evidence before the jury is justified in inferring that the decease committed suicide."

See also—

Stephenson v. Bankers' Life. Ins. Co., 108 Ia. 637, 79 N. W. 459.

Wood v. Sovereign Camp of Woodmen of the World, 166 Ia. 391, 147 N. W. 888.

Kornig v. Western Life Indemnity Co., 102 Minn. 31, 112 N. W. 1039.

We utterly fail to see why the doctrine of these cases is not applicable here. The reasons for the rule are stated to be: The instinctive love of life; that suicide is contrary to the general conduct of mankind, that it shows gross moral turpitude in a sane person. If the evidence shows that two roads are open to a man in the position of Stewart, by one of which he may disappear, but if he pursues the other

he will meet only a quick and speedy death, why should it not be presumed that he did not take the road which leads to death.

Now, if the general rule is applicable in the case at bar, can it be said that the facts and circumstances in this case, even if defendant in error's evidence alone be considered, exclude every other reasonable hypothesis other than that of suicide, as the cause of his disappearance?

The trial court, at the very close of the trial, the evidence fresh in his mind, frankly acknowledged his inability to find the fact of death established, but bases his conclusion of death upon a presumption that Stewart committed suicide. For, he states in his oral opinion: "In this case the court is asked to choose between the theory that he destroyed himself physically by his own act and the theory that he banished himself from his friends and relatives forever and became a wanderer and a tramp on the face of the earth, constantly on the alert, scanning every face for some look of recognition. You say he was a longheaded man. If he was he must have known that was the fate that awaited him if he fled."

Again referring to suicide, he states: "Therefore, the fact that he did many things on the trip down to attract attention to himself weighs about as much one way as the other. That is, he wanted everybody to recognize him so that each step could be traced, whichever motive was in his mind. That conduct would be about as natural in the one case as the other.

His getting on the boat and his conduct from there on it seems to the court that more reasonable explanation of it is that it was suicide, because whatever did happen he could not have anticipated that that is the way it would turn out."

POINT 2.

INSUFFICIENCY OF EVIDENCE SUBMITTED BY DE-FENDANT IN ERROR.

Irrespective of any rule relative to suicide and conceding the credibility of all witnesses who testified on behalf of Defendant in Error, the testimony falls short of establishing the death of Stewart. This is the only issue of fact in the case. It was decided by the lower court on presumption, without proof of the fact.

We believe it will be of assistance to the court, at this point, to give a brief summary of all the evidence upon which the lower court based his presumption of death, believing that no such presumption is justified therefrom.

The record in this case is quite voluminous, made so by reason of much irrelevant and immaterial matter being injected into it and in preparing the transcript for this court, it was not possible to eliminate all the immaterial testimony of the witnesses without interfering with the intelligent understanding of what remained.

Eliminating all details, explanations and conclusions, the real substance of what was shown by the plaintiff on the trial by her witnesses, in the order in which they testified, is, substantially, as follows:

Claude P. Hay was the bank commissioner of the state at the time of Stewart's disappearance, March 17, 1921. He went to Kelso on the evening of March 16th to determine what action should be taken with the affairs of the bank. Early next morning he and Stewart went to Portland to see E. S. Collins or any other person or persons there from whom financial assistance might be obtained for the bank. No assistance was obtained. Hay returned about ten o'clock that forenoon to take possession of the bank, in his official capacity,

which he did that day. Stewart was laboring under great excitement.

H. E. McKenney is a practicing attorney at Kelso. He was appointed administrator of Stewart's estate soon after his disappearance. Claims aggregating \$72,000 were filed against the estate. The estate inventoried "in the neighborhood of \$160,000." All of the real estate was encumbered and the estate was insolvent.

A. E. Stevens was in the automobile business in Portland. Stewart told him that his car was coming to Portland. Stewart talked about having his car shipped to California. Then he decided not to do that. The car did come from Kelso to Stevens' Garage on the order of Mrs. Stewart.

George F. Plamondon was assistant cashier in the Stewart bank. The bank was closed on the evening of the 16th in the ordinary way. The money and the books were placed in the vault and the vault was locked with the time lock set for eight o'clock the next morning. Stewart's account was often overdrawn.

Robert W. Roberts was porter at the Union Station, Portland, March 17, 1921. He knew Stewart. Four o'clock in the afternoon Stewart drove

up to the Union Station in a cab, he spoke to Stewart and Stewart spoke to him. He took Stewart's baggage inside the door. Stewart paid the taxi man and dismissed him. He did not come in the building at all. He just walked around in a quandary undecided which way to go. Then Stewart told him to bring the baggage out, put it in another taxi then drove away.

Clyde Hansen drove Stewart in an automobile from St. Helens to Goble between seven and eight o'clock on March 17th. Stewart got off the passenger train at St. Helens and as that train was about to start on its way through Goble, Stewart employed Hansen to bring him to Goble in an automobile. Hansen had known Stewart for many years but did not recognize him that night. When he arrived at Goble, Stewart paid his bill and then made himself known to Hansen, and stated to Hansen, as he was leaving, that he was going to a telephone to 'phone his wife. He then went to the ferryboat, known as the "Queen," which ferryboat carries passengers between Goble on the Oregon side and Kalama on the Washington side of the Columbia River..

T. H. Adams, special deputy supervisor of banking, was in charge of Stewart's bank since his disappearance. In his opinion the bank was insolvent from 1910 down to the time of Stewart's disappearance on March 17, 1921. There was no apparent change in the condition of the bank since six months previous to March 17, 1921. (108-111).

Carl H. Hayes was associated with Stewart in some transactions prior to the latter's disappearance. He took Stewart's car from Kelso to Portland and put it in the Haynes Garage on the 17th of March, 1921. He arrived in Portland about four o'clock. He went back to Kelso on the North Bank down the north side to Rainier. He saw Fred Stewart on the train, talked with him a little. Stewart talked in a low voice that he could not understand very well, he talked about the bank. Stewart asked him to leave him while he got a little sleep. Haves sent back to call him when they got to Rainier but he was not on the train and Hayes supposed that Stewart got off at Goble. Three other people from Kelso were on the train with Hayes. He and they took the ferryboat from Rainier to Kelso. (111-119).

Frank J. Sardam lived in Portland, was a life insurance agent for the Northern Life. He was in Kelso on the night of March 17, 1921. He had been in Kelso and at Stewart's home for five days previous, his wife was with him. Mrs. Stewart

wrote him to come down. Stewart seemed very nervous. He looked like he was about to collapse. He told Hayes to take the car to Portland. On the night of March 17, Sardam and his wife were at the Stewart home. About nine o'clock that night the telephone bell rang. Sardam went to the telephone and discovered it was Stewart who called up. Stewart said he would be home in about forty minutes. He inquired about his wife and son, but did not talk with his wife. (119-129).

F. A. Byrd is a practicing physician. He formerly lived at Kelso and was coroner of the county for two terms. He was familiar with the Columbia River. He remembered that people were drowned in the Cowlitz River and their bodies never found. He recalled where a lady was drowned in the Columbia slough and the body was never found. He said persons were drowned in the Columbia River whose bodies were never found. (130-140.)

William J. Pomeroy was the man in charge of the ferryboat Queen on the night of March 17, 1921. Stewart got on his boat before he left Goble. There were six passengers on board including Stewart. Stewart went into the cabin when the boat was about half was across the river. The schedule across the river is nine or ten minutes. When the

boat landed the passengers had to pass him or jump over the rail. All the passengers got off but Mr. Stewart, he left his grip in the pilot house. the passengers had paid their fares and the fares had all been turned in and then Stewart paid his fare. Stewart was in plain view of Pomerov when he paid the dollar to Shotswell. Pomeroy thinks one of the cruisers was out there all the time they were coming across. When the landing was made at Kalama, it was raining and the wind was blowing and the passengers naturally hurried off and up the slip. Sometimes he counted the passengers when they got off, not often. The guard on the water line of the boat projects out three or four inches. A person might step over the railing at rear platform, holding on to the windows, walk around on that guard. He testified he would not do it unless he was forced. Some of the life-preservers were piled up on that platform on the stern of the boat. (140-161).

Paul G. Shotswell was purser on the Queen on the night in question. He had known Stewart for fourteen years. Fred Stewart was a passenger on the boat on the evening of March 17, 1921. After he collected all the fares and turned them in, Stewart paid him a dollar, he went into the pilot house,

got the change and brought it back to Stewart. He paid his fare after the boat was half way across the river. Shotswell saw all the passengers get off except Mr. Stewart. They looked through the boat and Stewart was not there. He did not see Stewart get off. (162-168).

John Scanlon, a timber cruiser, was on the ferryboat Queen with Stewart on the night of March 17, 1921. After he paid his fare he and the two young men who were with him, and working under him, went into the cabin of the boat. One party came down into the cabin, looked around and then walked out, then another man walked down into the cabin with a brief case in his hand, a tall man with a long overcoat on. He stood and looked around, looked over at him, and looked at them, and walked right out of the door on to the stern of the boat. A few minutes afterwards the two young men walked out of the same door. In a few minutes they returned into the cabin, then he and they went out on the deck, got their packs and went ashore. As they started up the wharf he says one of the young men asked if he saw that man come back into the cabin and he replied he did not. After he and the young men got to their room the captain of the boat called to inquire about a man that was missing. He was asked if he had seen this man go out the back door of the boat, and he replied, yes, we seen him go out but we had not seen him come back in. While he was going up the incline he did not hear anyone state that a man had been lost, neither he nor the two young men with him made any statement to the man in charge of the boat or the other passengers about a man being lost or having fallen overboard. (168-171).

Raymond Schorer was one of the young men with Mr. Scanlon on the boat. He testified that he, Mr. Scanlon and Mr. Curtis, went into the cabin and when they were about half way across the river this man supposed to be Mr. Stewart came into the cabin. He stopped and glanced in the engine room, looked up and went to the back door and out. In about four minutes, or such a matter, after then, Mr. Curtis and he went out. When he and Curtis went out he did not see this man and he states: "He said he did not either, and did not think much about it." They came back in and nothing more was said about it until they got off the boat and went up the slip by the depot. He made no statement about Stewart's absence to anybody. He testified that neither he nor the young man that was with him made any search for Stewart when they went out. About one or two minutes after they went out the whistle blew for the landing and they went back in. He did not hear anyone give the alarm that Stewart was lost overboard. (171-175).

Mr. Pomeroy testified that the whistle for the landing is given four or five hundred feet from the dock at Kalama and that it would take one minute to get to the dock after the whistle was sounded. (175).

H. L. Curtis was the other young man with Mr. Scanlon. He testified about leaving the dock at Goble. They went into the cabin and stood there reading the signs on the wall when a tall man with a long overcoat and a brief case in his hand came in, stopped, glanced around the cabin, and went out the back door. Soon afterwards he and his companion went out and did not see the man who had preceded him, they went back in the cabin and said nothing about the man being missed. After they went to the hotel and went to bed two men came to the door to inquire. After they went up the slip he heard no alarm given about a man being lost. He testified that he is not accurate as to the time that he went out on the rear deck or how long he remained out there, he does not remember the whistle being sounded. He thinks when he went out on the back deck that he and his companion mentioned something about the other man not being there. When they went out it was raining and the wind was blowing, it was a bad night. (176-178).

Louis M. Plamondon was formerly associated with Stewart in the bank. He is a friend of Stewart. On the 15th he got a communication from Carothers, president of Stewart's bank. He testified that he went to Kelso, made an examination of the Stewart bank and then made a report to the bank commissioner as to the condition of the bank on the 15th or 16th of March, 1921. He does not testify why the president called him to the Kelso bank, and why he made the examination and why he afterwards reported directly to the bank commissioner. He testified that he and others had been figuring on a reorganization of the bank if it was humanly possible. They came to the conclusion that the amount of money they had, \$50,000, plus the entire liability of Stewart to the bank, if all paid, would not have saved the institution. He says his report was mailed to the bank examiner Monday, March 14th. The witness is the brother of George Plamondon, and Mr. Carothers, the president of the bank, is the father-in-law of George Plamondon. Prior to March, witness knew that the Stewart bank had been criticized by the banking department, he had known that for several years. He talked with Stewart about the criticisms made by the banking department of the state and Stewart generally laughed at the criticisms, he always did. (178-184).

Maude E. Stewart, the wife of Frederick L. Stewart, testified that she was married to Stewart in 1910. She testified that after Stewart returned from Olympia on March 6th he was a physical wreck and she invited Sardam and his wife to come down and visit them. He was extremely pale, he ate very little and slept very little. On the night of the 16th he stayed at the bank until about one o'clock in the morning. When he came home he said "I am afraid they are going to close the bank, there is only one more chance, Mr. Hay has asked me to go in and see Collins in the morning and we are going in on the five o'clock train." Before the witness left the witness stand counsel for plaintiff requested her to state "just at the time he took his departure what took place?" on the morning of March 17th, when he left for Portland. And the witness answered, "Just before he left he went into the room and took our little boy up out of his bed and went directly to the door and he came back three different times." On March 18th she received the letter marked Plaintiff's Exhibit "16" and testified that she had not heard from him since. She left Kelso on March 28th, 1921, and has not lived there since, except was back from August 4th to August 18th, 1921, and from March 12, 1922. (184-197).

J. W. Hogett, sheriff of Cowlitz County, testified. On the night of March 17, 1921, Captain Reid called him over the 'phone and told him that Stewart was overboard. He went down to the dock and made an investigation as to the rumor of Stewart being lost overboard. He testified that Captain Reid told him that Stewart did not get off the boat. (197-200).

William Stuart, prosecuting attorney of Cowlitz County, testified. On the night of March 17th, 1921, Captain Reid called him at about 9:45 and informed him about Stewart falling overboard. He testified that he went to Kalama afterwards, talked with Captain Reid, who told him that Stewart did not get off the boat. He was requested to issue a warrant for Stewart's arrest but refused to do so. (200-201).

Chris Hansen testified that his occupation is

that of diver and that he was familiar with the bottom of the Columbia River at Kalama. On the bottom of the river there are snags. The water is all the way from thirty feet to sixty-eight feet deep, it was high on the night of March 17th, 1921, about twelve feet above normal. The bottom of the river is very rough in some places, it will form holes and banks, in different places there will be piles of snags. If a body is caught in these snags it might be difficult for it to rise. (201-210).

G. H. Thayer testified that he has worked on boats on the Columbia River. He knew of a number of instances where persons were drowned and their bodies never recovered. (210-212).

While the witness Adams was on the stand it was stipulated by counsel for plaintiff that Stewart had appropriated to his own use several thousand dollars belonging to an estate which he represented, subjecting him to arrest, and if the charges were proven, to a sentence in the penitentiary. And among the proofs of death the following appears in plaintiff's Exhibit "31," being a letter written July 14, 1921, to the Prudential Insurance Company concerning the payment of the Stewart policies: "The facts are—and they can be amply proven—that Mr. Stewart faced criminal prosecu-

tion from a dozen different sources had he returned to Kelso, Washington, from Portland, where he went on the morning of March 17, 1921, in company with Claude P. Hay, State Bank Examiner."

Besides the foregoing testimony, there was received in evidence the two letters Exhibits "16" and "17," (186-195). Exhibit "17" is without date and there is no way of knowing when it was written. It was found in the bank after Stewart left—so it was written prior to March 17th. Exhibit "16" is dated March 17, 1921. The first paragraph reads: "If anything should happen to me before we get things straightened out I want to make these suggestions as to how to handle things for your best interests and those of everyone who have looked to me for protection." In the second paragraph of Exhibit 191.) "16" he wrote: "The whole thing has made me sick and I feel shaky, but think I will make it O. K. If anything should happen to me remember that I have \$86,000 of life insurance policies in the vault in your favor and about \$50,000 of accident policies all paid up to date. I want you to collect it all and have the Sardams help you. Make up to them any loss they have if they shall have any." (186-187.) In each letter he gives the wife about the same instructions relative to the payment to certain persons from whom he misappropriated money. Certain photographs of the ferryboat Queen,—ferryboat Elf—and the dock were received in evidence.

The foregoing is the substantial evidence offered by Defendant in Error when she submitted her case at the trial. We maintain it contains no substantial evidence to establish Stewart's death.

However, it does appear from this evidence, Stewart disappeared after going aboard the ferry-boat Queen. He had ample reasons for immediately disappearing from the State of Washington, and he had the choice of two courses, self-destruction or escape. Which did he choose? Instead of clarifying the situation, this evidence involves the main issue into deeper mystery, and instead of aiding the Court in presuming death, precludes it from doing so.

Salient facts established by this evidence showing that Stewart planned and carried out his escape are:

1. He had almost every reason imaginable to make his escape. His standing in the community was gone; his reputation was gone; he was a con-

fessed embezzler; he dragged his bank down to utter ruin; he was insolvent and he "faced criminal prosecutions from a dozen different sources." (Defendant in Error's Exhibit "31").

2. It must be conceded that these awful misfortunes might lead one man to despair and self-destruction, another to escape and total disappearance from the sight and knowledge of all his former acquaintances. To which class did Stewart belong?

Where suicide is to be proven, the most cogent fact to be offered is a predisposition to self-destruction. Such as threats to do so while in a state of gloom or despondency, acts or conversations indicating such a disposition covering some period of time prior to the actual suicide. Almost invariably the person driven to self-destruction possesses a sensitiveness to trouble, misfortune and grief.

All of these were absent in Stewart. His bank was practically insolvent for years. The state banking department's criticisms served as occasions for his mirth and laughter only. (183). Exhibits "16" and "17" wherein he recites the various sums of money misappropriated do not indicate much sensitiveness of either feeling or character.

If he intended suicide it would seem the im-

pulse so to do must have reached him when Hay left to take over the bank. If he contemplated suicide to avoid further disgrace by being arrested and sent to the penitentiary he would hardly have started back to Kelso.

Not a word of evidence is offered to show any disposition on Stewart's part to commit suicide. The first and only time in his life he intimates suicide is found in said letters Exhibits "16" and "17." If he planned escape and disappearance these are exactly letters he would leave behind to mislead. In reading these letters such a scheme is somewhat disclosed. He speaks of "debts of honor," "take me down to Riverside to be buried," "make a good excuse for you to come back up here—you could stay in Portland or Tacoma most of the time—." If he contemplated an escape, no plan to successfully do so could possibly be complete without just such a letter, nothing could be more natural.

3. The facts developed by this testimony justify the inference that Stewart planned and successfully made his escape.

On March 16, 1921, he received final word from the banking department that he must sever his connection with the bank. He had received other demands from the State Banking Department concerning the bank, and he paid no more attention to this request than he had to any other request from that department. He never did resign. And the banking department did not come to take possession of the bank until it was practically requested to do so by Louis Plamondon, who lived at Woodland, Washington, and was not connected with the management of Stewart's bank. (178-179.) This examination was made about the 14th of March, on which date a copy of Plamondon's report was sent to the banking department. That report, as explained by Plamondon himself. showed the bank hopelessly insolvent, and when sent to the State Banking Department by an outsider would have but one result, the closing of the bank. From all this, it is fair to infer that Plamondon was acting for Stewart. (180). Stewart was then ready to leave and to leave forever. But he wanted the banking department to take charge of the bank. And after Hay came for that purpose he did not take the bank over but requested Stewart to go with him to Portland in an endeavor to raise money to tide the bank over.

Five days before his departure his friend Sardam and wife were requested to come and stay at Stewart's home. On Stewart's return on March 17th, before taking the ferryboat at Goble, he telephoned his home previously, saying he wanted to talk with his wife. Sardam from Stewart's home answered the call. Stewart talked with him but did not talk with his wife. If Stewart had planned making his escape on reaching Kalama he was anxious to know if the means of transportation were ready.

After Stewart's disappearance, Sardam was prompt and faithful in carrying out the requests made by Stewart in his letters, Exhibits "16" and "17," in the collection of the life insurance policies. His fidelity was so keen in that particular that he falsely wrote all the life insurance companies "that some of the companies had agreed to make settlement if bond were furnished." As a witness he admitted that no company had agreed to pay and that a statement in the letter to the companies, in that particular, is false.

He probably did not fear that Hay would do anything to hasten his arrest, but some of the persons he took money from might, and so to appease them he telephoned Hay about the middle of the afternoon he had raised the money. (86.)

4. Nothing appears in the record as to what Stewart was doing between ten o'clock in the forenoon of March 17th and the time he went to the depot to take the train, except his call at Stevens' garage in Portland about two o'clock P. M.

The manner of his departure from Portland on that day, his going first to the Union Station, conversing with the porter that he knew there, then going to the other station, taking the train that goes beween Portland and Astoria, going into a car where none of the other people from Kelso were, telling his friend Haves to leave him as he desired to sleep, his getting off that train as it reached St. Helens, immediately employing an automobile to take him to Goble, arriving there just as the train he got off was leaving Goble, the pains he took to have the driver of that automobile recognize him, telling the driver of the machine that he was then going to the telephone to talk with his wife, then going down to the ferryboat and talking with Pomeroy, the captain of the boat, placing his grip or hand bag in the little pilot house where the captain stands, so the captain would be sure to observe it when the boat reached the other shore, not paying his fare at the time the other passengers paid, standing out in a conspicuous place,

handing the purser a silver dollar, remaining in the same place until the purser went into the pilot house, got the change and returned to him seventy-five cents, shortly after stepping into the cabin, looking down into the engine room, scrutinizing the faces of the three men in the cabin, then going out on the rear of the boat carrying with him the brief case, all demonstrates that Stewart was carrying out a well defined plan from the time he went to the Union Station until the moment when he went out on the rear platform. The principal part of the plan was, without doubt, to leave witnesses behind him who could testify to his movements, without a hitch, from the time he left the depot until he was last seen on that boat. It is contrary to common sense, reason and experience to claim that a man acting in such a deliberate manner for such a long time had in his mind the determination to kill himself at a certain time and place. If he desired to destroy himself he could have done so in a dozen ways, leaving behind him certain proof of his death, without delay and travel.

From this evidence it appears that Stewart had at least two means of escape from the boat after he went out on the rear deck. He could have put on the life preservers, a pile of which were out on that deck, and made his escape by floating ashore or being picked up by a boat. (161). He could have walked out along the side of the little ferry-boat on the projecting timber, kept himself concealed until the boat was tied alongside the ferry-boat Elf, when he could have stepped over the railing onto the other boat and walked off without being observed by anyone.

So, if the presumption against suicide be left out of consideration, the inference of escape and disappearance, from this evidence, is more reasonable and natural than the inference of suicide.

The case of Ashbury v. Sanders, 8 Cal. 62, 68 Am. Dec. 300, resembles the case at bar in many particulars. There, as here, the only issue involved was the existence or the death of the insured. In the course of the decision the court states:

"The only question of fact in this case, decided by the court below, was the alleged death of Sanders, the defendant. It was shown in proof that Sanders left San Francisco in the bark Elvira Harbeck, for Manila that said bark arrived at the Sandwich Islands on the second day of May, 1855, and soon left, with Sanders on board, since which time nothing has been heard of him or of the vessel, or any of the crew; that the insurance on the vessel, as a total loss, had been paid, and the relatives of the master and his wife, who were on board, went into mourning for them, and had given them up

as lost. It was also shown that Sanders was indicted for a felony and had absconded. The trial in the court below was held on the seventeenth of September, 1856, being sixteen months from the time the defendant was last heard of. The case was tried without a jury and the court found the death of the defendant, and the plaintiff appealed to this court.

"This is one of those cases where a question of fact must be settled by presumption, without positive proof. Every system of law must, from necessity, indulge in presumption in certain cases. The presumption may be arbitrary, but still indispensable. Questions must be settled, and all that can be done is to adopt the most reasonable presumption that the case allows; and as presumptions must be indulged, in such cases, it becomes most important that some certain and consistent rule should be adopted."

The lower court was reversed, and in reviewing cases, holding otherwise, from other jurisdictions, the California Court observed:

"In that case, Paddock was master of the vessel, while in this, Sanders was only a passenger, and a fugitive from justice. In the first instance, Paddock had every inducement to return home; while in the second, Sanders had every reason to remain abroad, and to conceal the fact of his existence from the people he had wronged."

When a party of good habits, excellent character, of fair business prospects, respectably connected, and of happy domestic relations, having the fullest confidence of his friends and the entire affec-

tion of his wife, and was living in apparent happiness, with no cause for discontent with his condition, the court may, under such circumstances, presume death prior to the expiration of seven years.

But where a party disappears in the circumstances that Stewart disappeared, no such presumption is justified.

Spahr v. Mutual L. Ins. Co., 98 Minn. 471; 108 N. W. 4.

Richmond Security Bank v. Equitable L. Assur. Soc., 112 Va. 462; 71 S. E. 647.

Hancock v. Am. L. Ins. Co., 62 Mo. 26.

At the threshold of the litigation, Defendant in Error was confronted with the burden of proving Stewart's death by a preponderance of the evidence. It was not incumbent on the part of the Insurance Companies to show he is living. To meet that proof she now relies upon a presumption of death and bases that presumption upon facts that more reasonably justify the presumption of his escape and disappearance.

Hence, conceding the credibility of every witness testifying for Defendant in Error, and giving to the other evidence submitted by her its most

favorable application, the presumption of death is unjustified. The trial court, in his oral opinion, frankly states, that in his mind, either theory, that of suicide or of escape, is equally inferrable from the evidence. For he says in the opinion:

"In this case the court is asked to choose between the theory that he destroyed himself physically by his own act and the theory that he banished himself from his friends and relatives forever, and became a wanderer and a tramp on the face of the earth, constantly on the alert, scanning every face for some look of recognition. You say he was a longheaded man. If he was he must have known that was the fate that awaited him if he fled."

Again referring to suicide, he states:

"Therefore, the fact that he did many things on the trip down to attract attention to himself weighs about as much one way as the other. That is, he wanted everybody to recognize him so that each step could be traced, whichever motive was in his mind. That conduct would be about as natural in the one case as the other."

So far, we have directed attention only to the evidence of Defendant in Error. We find that the most the trial court could say for it is that it equally supports either theory, suicide or disappearance. The trial court refused to apply the rule of presumption against suicide (40-41) and so he resolved the uncertainty against the Insurance Companies.

We shall next direct the Court's attention to evidence submitted by Plaintiffs in Error, not only showing the manner he escaped but that he is actually living.

POINT 3.

EVIDENCE SUBMITTED BY PLAINTIFFS IN ERROR.

Not only did Defendant in Error fail to establish Stewart's death by a preponderance of her own evidence, but his existence is shown by evidence offered by Plaintiffs in Error. Primarily Defendant in Error must prove the death before any relief can be granted to her. Hence, if the Court were to find our evidence insufficient to prove Stewart is alive, that would not be availing in support of her case.

We believe, however, that the evidence offered by Plaintiffs in Error does establish the fact that Stewart was living after the 17th of March, 1921. This was shown by the disinterested testimony of men who had the opportunity of seeing him.

For the convenience of this Court, we shall now direct attention to the substance of that testimony.

George Elwood, 48 years old, was a traveling salesman, handling barbers' supplies, residing at Laverne, California, and who had lived in the vicinity of Portland for twenty-nine years just prior to his removing to Laverne in 1920. He personally knew Stewart from 1904 to 1920. He operated a barber shop in Kelso for two years, saw Stewart daily, and shaved him twice a week. saw and talked with Stewart in February, 1920, a little over one year prior to his seeing him in Hanford, California, about March 24, 1921. On or about March 24, 1921, Elwood stopped at Hanford to sell his goods, while there, and, as he was standing in the barber shop of one of his customers, he saw Stewart walking towards him, but a few feet away (281; Exhibit X). Immediately Stewart turned, went back about forty feet and hurried into an automobile and drove away (284). Before Elwood could turn the door and get out, Stewart had turned and was on his way to the automobile (266). All that Elwood testified to as occurring at this time, is corroborated by two barbers in that shop, one of whom cut Stewart's hair but a couple of hours before, the substance of whose depositions are later quoted in this brief. Elwood testifies positively that the man he saw on this occasion in Hanford was Stewart;

he described the walk, carriage and other outward characteristics of the man which corresponded to those of Stewart. Elwood was then on his way north, covering his regular trip up as far as Seattle. He knew nothing of Stewart's disappearance until he reached Cottage Grove, Oregon, where a friend told him of Stewart's disappearance.

Counsel for Defendant in Error devoted hours in the cross-examination of Elwood, and we believe, without any discredit to his testimony.

Benjamin Vienna, 25 years of age, an exservice man, residing at Hanford, California. was a barber in the shop referred to in Elwood's testimony, he recalls it was March 23 or 24, 1921. At the time he and Elwood were discussing about the purchase of a strap, when Elwood remarked, "Just a minute, there is a friend of mine," and Elwood rushed out the door, he followed Elwood and recognized the man as the party whose hair he cut that day. This witness described the man in detail from which description, the man had Stewart's chief personal characteristics. Elwood returned into the shop, he remarked, "An old friend of mine, he don't want to recognize me. I used to shave him, he is an old friend of mine." He recognized the photographs annexed to the Hanford depositions as a good picture of the man whose hair he cut, and as the man Elwood undertook to greet. (281, 282, 283, 284.)

Paul Koeper, aged twenty-nine, was another barber in that shop. He remembers the time Elwood was at the shop in March 1921. He recalls Elwood saying: "There goes an old friend of mine from Washington" and then rushing out the door to greet him, and when Elwood returned into the shop he said, "The gentleman will not recognize me" (286, 287).

That there might not be any doubt as to the dates Elwood was in Hanford, we produced the testimony of another of Elwood's customers at Hanford, George Hedges, and he testified: "I know George Elwood. I met him last March and did business with him the twenty-first day of March. I bought a pair of clippers from him. Defendant's Exhibit "K" is the check I gave Mr. Elwood when I bought the clippers. This check was delivered by me to Elwood here in the city personally."

Spiro Papalian, owner of a restaurant at Hanford, forty-five years of age, testified that the photographs annexed to the depositions are pictures of a man that was served in his restaurant in March, 1921.

The witness Orvalle Onorato testified by deposition taken at San Diego, California. He was born at Kelso, Washington, twenty-two years ago. At the time he gave his deposition he was in the United States Army, Air Service. He lived in Kelso all his life excepting about four years when he was in Europe, while a child, and three years he was in the army. He was well acquainted with Stewart all the time he lived in Kelso, talked with him, did some business with him. Stewart knew the witness all the time he lived in Kelso. The witness lived only a mile from Kelso, his home was only a few rods from the city limits. He saw Stewart in the city of Pasadena about the 26th of April, He was riding in an automobile when he 1921.saw Stewart. The automobile was approaching Stewart slowly when he saw Stewart. The witness testified, "I took a good look at him from the front, passing to the side and then looking back. I saw his face. I saw him walk away and when I first saw him I was approaching him." There were no pedestrians on the street when I saw Stewart. The witness further states, "If my brother had been walking on the sidewalks where I saw Stewart walk that day and I saw him just as I saw Stewart and under the same circumstances, I would not have recognized my brother any quicker than I recognized Stewart."

In answer to a question on cross-examination, the witness stated: "I cannot swear that it was positively he because I have no way to prove it was, but I am positive," and then the witness testified, "I understand by these questions that Mr. Langhorne wanted me to be absolutely positive and be able to prove that that was Stewart. Now, if I do not have to prove anything at all but just testify myself, I testify that that was Fred Stewart I saw in Pasadena. I have no hesitancy whatever in testifying that that was Fred Stewart I saw at that time and place."

We next produced the testimony of the men in charge of the boat who claimed to have taken Stewart as a passenger from the border between the United States and Mexico to Manzanillo, Mexico.

Arthur E. Pooley was the purser on that steamer, "Mazatlan." He testified that the boat left San Francisco April 1, 1921, the first Mexican port was Ensenada. It was his business on the boat to look after the freight, general business of

the people, etc. He came in contact with the passengers every day. Defendant's Exhibit "A," a photograph annexed to the depositions, "absolutely resembles a person we carried on that voyage. I think he was in the forties, he was not as fleshy as that picture represents. This picture is a trifle younger than the man I refer to. Defendant's Exhibit "B" is more like the actual look than the other photograph, his face is thinner and he had wrinkles when he pulled back. His hair was brown with a little gray in it. It was wavy. He had a long slim nose, his face was narrowed up to his chin. was nearly six feet tall and weighed about one hundred and sixty pounds. He stood erect with a habit of throwing his shoulders back, his walk was erect and sedate you might say." Witness testified that the man got aboard at San Pedro or Ensenada. He talked with him during the voyage, talked with him every morning and he called at his room every once in a while. He did not talk to him about his private affairs. He had occasion to see him every day, he ate at the same table with him, he sat opposite Stewart at the table. He received two packages from this man, the packages were about ten inches long, two or three inches thick and three or four inches wide. He delivered these packages back to this man just before they arrived at Manzanillo, where the man left the boat.

K. Hansen was the first officer on the boat Mazatlan. He testified that they had a man on that trip of which defendant's Exhibit "A," photograph annexed to the deposition, "appears to be a picture. He was about five feet ten inches something like that, he was slim, he looks younger in this picture than he really was when I saw him. The man I saw had a narrower face than this fellow, his hair was wavy, it was something like mine, light brown. I think he got on the boat at Ensenada, he got off at Manzanillo. He ate at the table with me. Defendant's Exhibit "B" does not look so much like him as the other, I suppose I met him more face to face. I would not say that the picture is of that man, but it resembles him, the picture looks exactly like it should be him. I could not swear it is the same man, it is impossible, may be two men look alike."

Captain F. C. Meyer was the captain and navigator of the boat Mazatlan. He was thirty-five years of age, he testified that Defendants' Exhibit "A" appeared to be a likeness or a picture of a passenger on that trip. Defendants' Exhibit "B" appears more as a likeness of the man than Ex-

hibit "A." "The man I saw was not as young looking as this picture, Exhibit "A." His face was not filled out as much. His hair was not black. It was not combed as indicated in this picture Exhibit "B." I conversed with this man. On one occasion and maybe more during a little card game he did not talk much. As far as I can recall, he came aboard at Ensenada. I lost track of him at Le Paz. I first saw this photograph in June, 1921. This man was about six feet more or less, his build was tall and slender, he weighed about one hundred and seventy-five pounds. These photographs are likenesses of a man that was on the ship but I will not swear that that was the man, the photograph of the man that was on the ship. What I mean to say is this: When I saw this photograph for the first time in June last year I immediately saw that I had seen a man of that description somewhere and by refreshing my memory I found that that man had been a passenger on this ship, a man answering that description; now, whether this man, that this photograph resembles is the same man or not. I do not swear to that."

Walter H. Comber, a resident of Corona, California, testified by deposition. It developed on the trial, by the testimony of reputable citizens

of Seattle, where he formerly lived, that his reputation for truth and veracity is bad, and, therefore, we do not ask the Court to consider his evidence at all.

Charles B. Dill a resident of Kelso for four-teen months and who had known Stewart for five years before coming to Kelso, identified the photographs Exhibits "C" and "D", annexed to the Hanford depositions, as good pictures of Stewart, Exhibit "D", being a more recent picture than Exhibit "C." "If I had never seen Stewart in my life I would say that these two pictures were made of the same man. I would say that Exhibit "D" is a good picture of Stewart as I saw him in March of last year. His hair as shown in this picture looks about as it did when he went away, the style of it."

Thomas McDermott a man seventy-one years of age who had known Stewart personally and intimately all the time Stewart lived at Kelso, also identified Exhibits "C" and "D", annexed to the Hanford depositions as being pictures of Stewart.

Harry E. Moores was the general ticket agent at Seattle for the Consolidated Raidroad Ticket Office. His testimony shows that there is railroad communication between Manzanillo, Mexico, and El Paso and Los Angeles. If a passenger had left Manzanillo on April 20, 1921, he would have reached Los Angeles in four days and sixteen hours.

Captain Simpson had lived on the Columbia River for forty-five years, twenty-five of which had been spent as captain of the railroad ferry boat, "Tacoma" plying between Goble and Kalama. He testified, "I should say that the bodies of persons drowned in the Columbia River during all my experience were usually recovered. I do not recall any specific instance where the body was not recovered." As a rule, the March freshets last only about four days, the real flood takes place later in the year, April, May and June. From his experience with the river, an object like a human body fully clothed with an overcoat on, falling from the ferryboat at the place described by the witnesses, would be found at about Cottonwood Island. (260-263).

Daniel McCoy stated that he had lived on the Columbia River since 1895 and at Kalama since 1910, and had been a fisherman on the river during that entire time. That in his experience the bodies of people drowned in the Columbia River had been found; that he had worked a day and a

half searching for the body of Stewart; that there were some five or six other boats engaged in searching for Stewart's body; that some of them worked there every day for a whole week; that some of the outfits engaged in searching for Stewart's body employed two boats. Between these boats a line 200 feet long was stretched and on this line there were fastened sturgeon hooks having an inch and a half or two inch circle. These hooks were placed on the lines about twelve inches apart and then a weight fastened on each end of the line.. By placing a boat at each end of this line it was kept stretched and they were able to drag it up and down the river. Some of the outfits, however, engaged in searching for Stewart's body used barbed wire. He further testified that he had no reason for believing that Stewart's body was covered up in the river at the time persons were engaged in dragging for it. That if Stewart went into the river he would expect to find his body on the bottom east of the Kalama River. The Kalama River is about two miles from the dock in Kalama and below the lowest spot touched by the "Queen" in making the round trip between Kalama and Goble. That when he dragged the river with the hooks he went down as far as the mouth of the Kalama River.

To the best of his knowledge the river was not dragged west of the Kalama River. That if Stewart's body was in the bottom of the river covered up with three, four or five inches of sand or dirt, that sturgeon hooks would not plow down a foot or a foot and a half in the ground. That he had heard of bodies going into the Columbia River that had never been found.

B. K. Bartleson also testified as to the condition of the river. He has been on the Columbia River since 1895, fishing all the time. A number of fisherman got together for the purpose of clearing a space of ground on the bottom of the Columbia River for fishing purposes at that particular place. This man Hansen, who testified, was employed by them as a diver. This drift was located one-third of a mile below the Kalama dock and extended from the Washington shore out about five hundred feet and goes to the Kalama River, about one mile and a half long. In the fall of 1920 and before March 17, 1921, we cleared this drift of snags and chunks and whatever obstructions there were on the bottom so the net could drag on the bottom for catching salmon. On March 17th, 1921, it was pretty well cleared of obstructions. Just beyond the drift that we had there was another, the Kalama drift, which was alongside ours. In all my experience in the Columbia River, I know of only two bodies of drowned persons that were not recovered.

Captain Reid, the owner of the ferryboat "Queen" dragged the river for Stewart's body for seventeen days and about 25 other persons with boats and tackle searched the river for his body (234). Captain Reid saw an automobile with curtains all drawn standing about a block and a half from the ferry landing the night Stewart was on the boat (230). Captain Reid further testified in some detail that six men came up the slip after the "Queen" landed at Kalama on the night of March 17th, and a like statement was made by Mr. Chisholm one of the passengers on board the boat that night. The trial judge, however, found that these witnesses were mistaken as to this matter and we consequently do not ask the court to consider their testimony in this regard.

On reading the trial court's oral opinion, it will appear that the court did not question the credibility of any of the witnesses quoted who testified to having seen Stewart. But the court did, in substance, say he thought they were mistaken. Excepting Elwood, all the witnesses in this regard testified by deposition and consequently this court

has the same apportunity for judging the credit to be given to them that the trial court had. In weighing the testimony of those witnesses, it should be borne in mind that Stewart was practically a fugitive from justice and desirous of concealing his identity and location. If he saw a person he knew, he would act just as the Hanford witnesses said he acted; he would turn and hasten away as he did when Elwood recognized him. Although counsel spent many hours in the cross examination of Elwood, we believe not a thing developed to discredit him. He was a barber at Kelso, he shaved Stewart and cut his hair many times, was intimately acquainted with him. If any man outside of Stewart's own family would be able to recognize him, surely Elwood was the man. Who could have a better opportunity for such an intimate observation of a man's looks and mannerisms than his barber? If he were the only one who claimed to have seen Stewart, it would not be strange to think he might be mistaken, but other persons also saw Stewart. Vienna, a barber at Hanford, testified to the occasion when Elwood went out to greet Stewart, and corroborates Elwood. This barber identified Stewart's photograph as the picture of the man Elwood greeted, and as the man whose hair he cut the same day.









Another barber in the same shop identified Stewart's photograph as the man who had his hair cut there.

The testimony of the three officers on the steamer "Mazatlan" who claimed to have taken Stewart from the border between the United States and Mexico down to Manzanillo identified a photograph of Stewart as a picture of the man who was on the boat. Captain Meyer saw the photograph within sixty days after he conversed with Stewart, ate at the same table with him and played cards with him.

It was claimed on the trial that the photographs, attached to the depositions and identified by the witnesses, were not representations of Stewart as he appeared in 1921. To show that, defendant in error offered a kodak picture (Plaintiff's Ex. 36) as being a good picture of him at that time. For this court's information, we enlarged the photograph annexed to all the depositions, as well as the kodak picture, and reproduce them in this brief. These reproductions disclose not only that the pictures are of the same man, but also, that his marked characteristics never changed, the passing of time did not efface them.

Upon consideration, therefore, of the testimony

of all these disinterested witnesses, it would appear that Stewart is living.

It must be conceded this evidence is *prima facie* proof of Stewart's existence.

The contention of defendant in error is that Stewart committed suicide on the night of March 17, 1921. It is asserted that Stewart's death by suicide is proven by a preponderance of the evidence because he was known to have been on the "Queen" on that evening and no one saw him get off.

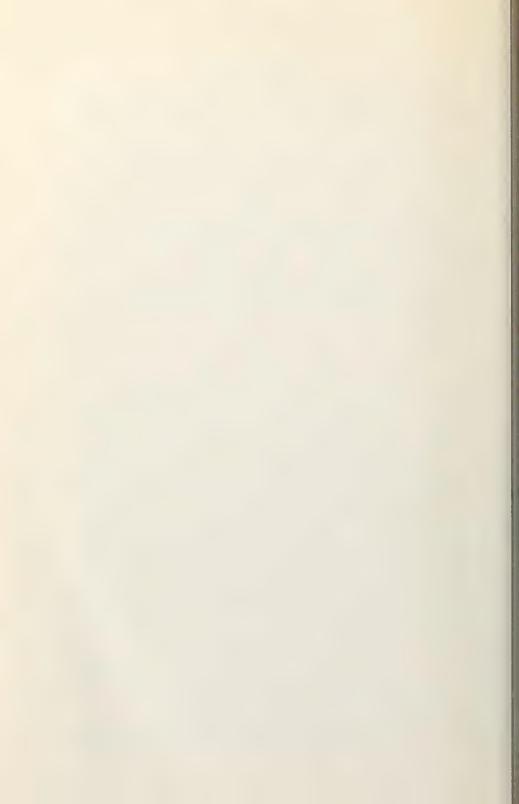
It is obvious, however, that a man in Stewart's position and desiring to disappear might have done so in several ways. For instance, he might have gone out on the rear platform of the boat, stepped over the railing and remained free from detection by holding on the side of the boat and standing on the three or four inch guard. If Stewart pursued that course he might later have walked up the slip unobserved by anyone, for, so far as the evidence discloses, there was a considerable space of time after search of the inside of the boat was made when there was no one on the "Queen," the "Elf," the slip or the street at the head of the slip.

There can be no question that he had strong reasons for desiring to disappear. He was an embezzler and faced prosecutions from a dozen different sources.

Moreover, if he went overboard from the "Queen" it is strange, to say the least, that neither his body nor anything belonging to him was ever found, though diligent search therefor was immediately made. Strange also is it that so many men could be mistaken as to the identity of the man having the marked characteristics which Stewart had.

The trial court concluded that the actions of Stewart until he went on the boat were as consistent with disappearance as with suicide, but despite that conclusion found that defendant in error had proven that Stewart was dead. In view, however, of the evidence, the presumption in favor of the continuance of life and the presumption against suicide, "one of the strongest presumptions with which courts have to deal," we submit that defendant in error has not sustained the burden of proving that Stewart committed suicide on the night of March 17, 1921.

Respectfully submitted,
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In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 3918

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, A CORPORATION, AND MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, A CORPORATION, PLAINTIFFS IN ERROR

-- VS --

MAUDE E. STEWART, DEFENDANT IN ERROR

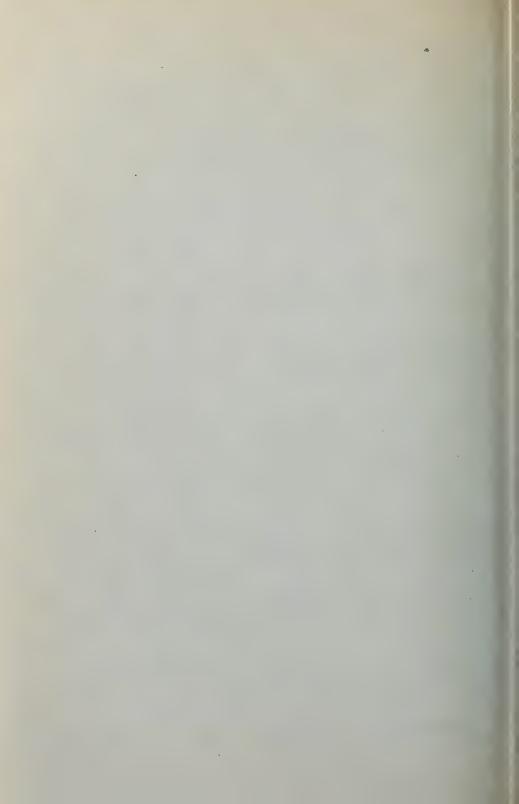
Upon Writs of Error to the United States District Court of the Western District of Washington, Southern Division

BRIEF OF DEFENDANT IN ERROR

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BRIEF OF DEFENDANT IN ERROR

STATEMENT

The statement of the case made in the brief of the plaintiffs in error is so confused, inaccurate and in certain respects so misleading that we challenge its correctness and herewith submit a statement of our own, which we claim the record will in all particulars substantiate.

On August 17, 1915, August 7, 1916, and April 17, 1917, the Prudential Insurance Company, one of the plaintiffs in error, in consideration of a stated premium, to be paid yearly, issued its three certain policies of life insurance for \$5,000, \$25,000, and \$5,000, respectively, wherein and whereby it agreed upon the death of Frederick L. Stewart, the insured, to pay to Maude E. Stewart, the defendant in error, then the wife and now the widow of the insured, the amounts denominated in the policies.

On July 15, 1915, and July 28, 1915, the Mutual Life Insurance Company of New York, the other plaintiff in error, in consideration of a yearly premium to be paid to it as specified in the policies, issued to the said Frederick L. Stewart its two certain policies of life insurance for \$5,000 each, to be paid to Mrs. Stewart upon the death of the insured.

On March 17, 1921, these policies were in full force and effect, no default in the payment of premiums having occurred.

At the time of the issuance of these policies of insurance the insured, Frederick L. Stewart, was and for some time prior thereto had been the cashier





Defendant's Exhibit "T." duplicate of Exhibits marked Exhibits "A," San Diego, Exhibit "I," S. C.

of the Kelso State Bank, a banking corporation, organized and existing under and by virtue of the laws of the state of Washington, which position he continued to hold until the date of his death.

Mr. Stewart was on March 17 1921, of the age of forty-nine years. He was about six feet in height, complexion fair, blue eyes, brown hair, slender build, weight about one hundred and sixty pounds. He was of a type common to many. Perhaps the most noticeable thing about him were his upper teeth, which with the exception of the three front ones were all crowned with gold. Dr. Barnard, his dentist, testified that:

"The bicuspids and the front teeth were exceptionally long. Mr. Stewart had a medium sized mouth, but his lips were very thin. When he was talking or laughing or even in ordinary conversation the first thing you would notice were his teeth." (318, 350, 336.)

In 1908 and 1909, Mr. Stewart was possessed of an exceedingly heavy head of hair, which was quite wavy and curly. On the opposite page we reproduce a photograph (defendants' Exhibit "T") of Mr. Stewart, that was taken prior to his marriage sometime in 1909. (This is the photograph that was exhibited to the witnesses for the insurance companies, whose depositions were taken at Han-

ford, San Francisco, Riverside, and San Diego, California, and not the photograph (Pltffs' Ex. 36) reproduced in the brief of counsel for plaintiffs in error. Why they omitted to reproduce this photograph (Deft's Ex. "T") we do not understand. However, we do not want this court to get the impression that it was the photograph reproduced in the brief of the plaintiffs in error that was exhibited to the witnesses whose depositions were taken at the places referred to.) The ravages of time, however, played rather sad havoc with the thick head of hair that Mr. Stewart possessed in 1909, and in 1920 he had lost a considerable portion of the same. On another page we reproduce a photograph (Pltffs' Ex. 36) of Mr. Stewart that was taken in September of 1920. (315.) The undisputed testimony, as well as the latter photograph (Pltffs' Ex 36), disclose that for some years prior to March 17, 1921, Mr. Stewart had not only lost a large portion of the hair that he possessed in 1909, but that he had ceased to wear his hair in the style or manner disclosed in the old photograph (Deft's Ex. "T"), taken in 1908 or 1909, and that in 1920 and 1921, and for years prior thereto he had worn his hair in what barbers term "pompadour style." Many of his friends and business associates so testified. (318, 336, 350.)



Plaintiff's Exhibit 36. This photo taken in 1920.



Henry J. Asbury, a barber of thirty-two years' experience, says

"I have often cut hair in pompadour style. I recognize defendant's San Diego Exhibit 1 (duplicates of defendant's exhibit "T"). That photograph shows the style in which Mr. Stewart wore his hair when he served in the State Senate. Assuming that the man in the photo (Pltffs' Ex. 36) had worn his hair in pompadour style for seven or eight years I don't think from the thinness of his hair that he could ever get it back in the style shown in defendant's San Diego Exhibit 1." (340.)

(San Diego Exhibit "I" is a duplicate of defendant's exhibit "T").

We have set down the foregoing undisputed facts to the end that this court may more readily understand and assimilate what is to follow.

On March 17, 1921, between the hours of 8:50 and 9:15 p. m., Mr. Stewart, the insured, met his death, so we claim, by being drowned in the waters of the Columbia River. The insurance companies were immediately notified of his death and afterwards were furnished with proofs of death, but they denied all liability, claiming that Mr. Stewart is still alive. Separate actions were thereafter instituted to recover on the policies, and when the issues were joined a stipulation was en-

tered into consolidating the separate actions and waiving a trial by jury, and consenting that the consolidated action be tried to the court. (34, 35, 36, 37.)

The trial in the lower court was commenced on April 4, 1922, ending April 11, 1922, at the conclusion of which Judge Cushman promptly directed that judgment be entered in favor of the plaintiff for the full amount sued for. Findings of fact were filed, only two of which were excepted to. In the eighth finding of fact in the Mutual Life Insurance Company case and in the tenth finding of fact in the Prudential case, it was found by the court that on the 17th day of March, 1921, between the hours of 8:50 and 9:15 p. m., the insured met his death by being drowned in the waters of the Columbia River. (58, 63.)

This finding is predicated upon the following facts and circumstances: As before stated, Mr. Stewart was on March 17, 1921, and had for many years prior thereto held the position of cashier of the Kelso State Bank. He also owned a controlling interest in that institution, which the evidence discloses had been in failing circumstances for a long time prior to the last mentioned date. On Sunday, March 6, 1921, Claude P. Hay, state

bank examiner for the state of Washington, held a meeting with Mr. Stewart in the office of the former in Olympia, Washington, and at said time and place demanded the resignation of Mr. Stewart as cashier of the Kelso State Bank. On this phase of the case Mr. Hay testified as follows:

"I asked Stewart to come to Olympia. I told him my reason for demanding his resignation was that I was not satisfied with his management of the institution. I cannot recall whether he wrote out his resignation then or not, but I don't think he did. It was my intention to have him understand that he would have to sever his connection with the bank, but I didn't care to give any publicity to it at the time for fear of the ill effect it might have on the institution. The understanding was that the management of the bank be virtually turned over to someone else, and that he would resign as soon as he could gracefully do so." (88.)

However, Mr. Stewart did not resign.

Shortly after the conference between Mr. Hay, the state bank examiner, and Mr. Stewart in Olympia on March 6, 1921, Louis F. Plamondon, president of the Woodland State Bank, with a view to reorganizing and taking over the management of the Kelso State Bank, made an investigation into the financial condition of the latter bank. The result of Mr. Plamondon's investigation into the

affairs of that bank is contained in a written report rendered to Mr. Hay, dated March 15, 1921, which report was received by Mr. Hay at his office in Olympia on March 16, 1921. (Pltffs' Ex. No. 15, —180, 181.) This report discloses that the bank was hopelessly insolvent.

On March 16, 1921, Mr. Carothers, president of the Kelso State Bank, went to the phone at Kelso, and called Mr. Plamondon at Woodland, and requested that he (Plamondon) phone or wire Mr. Hay, the state bank examiner, to come down and take charge of the bank. This Mr. Plamondon did. Mr. Stewart had no knowledge of Carothers' action in this respect. After the receipt of Mr. Plamondon's message Mr. Hay left Olympia, Washington, and arrived in Kelso between the hours of 8 and 9 p. m., the evening of March 16, 1921. Stewart had not been forewarned of his coming. After Mr. Hay arrived in Kelso he sought out Stewart and made known to him his mission. The two indulged in an extended conference, the result of which was an agreement to journey together to Portland, Oregon, some thirty or thirty-five miles distant from Kelso, and endeavor to procure financial assistance in that city, the financial center of the northwest, to prevent if possible the closing of the Kelso State Bank. The conference between Hay and Stewart broke up between 1 and 2 o'clock in the morning of March 17, 1921, and when he reached home after its conclusion he was, as testified to by Mrs. Stewart, the defendant in error, "on the verge of a collapse."

Prior to leaving for Portland, Oregon, on the morning of March 17th, between the hours of 5 and 6 a. m., with Mr. Hay, his wife tried to induce him to eat a little breakfast, but he refused so to do. She also testified that he did not sleep during the night.

Mr. Hay testified that while on their way to Portland:

"Stewart was very pale, and under a great strain. He didn't talk very much. I remember that he asked me several times my opinion as to whether or not Collins would help us. I didn't pay very much attention to just what he did say, because it was just what one might expect from a man laboring under great excitement, and Stewart appeared to be laboring under great excitement." (84-88.)

Mr. Hay and Mr. Stewart arrived in Portland between 7 and 8 o'clock on the morning of March 17, 1921. The result of their trip was disappointing in the extreme, as no financial assistance was forthcoming from that quarter to prevent the impending failure of the Kelso State Bank. Mr. Hay then decided to return to Kelso on the train, leaving Portland at 10 o'clock a. m. Before doing so he called up the president of the Castle Rock State Bank, which city is located some ten miles north of Kelso, and requested the president of that institution to meet him in Kelso upon his return from Portland. It was the thought of Mr. Hay as well as of Mr. Stewart that the president of this institution might consent to come to the aid of the Kelso bank. Upon Mr. Hay's arrival in Kelso he was met by the president of the Castle Rock State Bank, who after a short investigation into the financial condition of the Kelso bank declined to render any financial assistance. Mr. Hay then closed the bank and commenced the process of liquidation.

When Mr. Hay left Portland, Stewart did not accompany him back to Kelso. Some time during the early hours of the afternoon of that day Mr. Stewart, who as noted remained in Portland, Oregon, called Mr. Hay over the phone and in the conversation that followed Mr. Hay informed him that he had been compelled to close the bank. (86.)

Events then followed each other in swift succession. Mr. Stewart went to the Oregon Hotel in Portland, where he always stopped when in that city, and indited to his wife the following letter:

"March 17, 1921.

"Dearest Girl:

"I think I have everything fixed now, but I just learned that they intend to close the bank and I don't know what they intend to do next. Looks as tho they were determined to put me out of business. I am going home by way of Eadem this evening with enough money to stop any ordinary trouble. Collins wouldn't do a thing and I didn't really expect him to, but Hay wanted to try it anyway.

"The whole thing has made me sick and I feel shaky, but think I will make it all O. K. If anything should happen to me remember that I have \$86,000 of life insurance policies in the vault in your favor and about \$50,000 of accident policies all paid up to date. I want you to collect it all and have the Sardams help you. Make up to them any loss they have if they should have any.

"Take care of the following obligations of honor cut of it, also, please.

"First, a bond I have used out of the Richter estate, of which I am administrator, in the sum of	\$10,000
Also 3 of \$500 each or a total of	1,500
2 notes of Huntington's which have been paid off, and (which I was under bond for and had the money to help our business)	750
respectively, making a total to Richter estate of	13,250
Also 2 notes indorsed to old Mrs. James of	1,200
Also 1 note to Mrs. Lena Bozorth of (Carr)	600
and 1 to Mrs. Jennie Rogers of approxi-	
mately	2,000
and 1 to J. H. Rogers of balance of	800
and 1 to the bank of my own of (Johnson)	6,000
and 1 to the bank (Fisk memorandum note)	6,250
and 2 to the bank of \$3,750 and \$2,200	5,950
	\$36,050

being notes of the Kelso Farm Co. which I am responsible for, making a total of \$36,050. I don't think of anything else except what the banks and individuals have security for.

"This should leave you plenty for you and Sam. There is a memorandum will in our box in the vault but this action of the people about the bank nullifies it to quite an extent and I figure they will take all our property and you will have to leave any debts to be taken care of as they shall determine out of the same. There is also a sealed letter of instructions in the box but it covers this same ground, and if you get it better read and destroy it. It was only written in view of what I feared they might do to get me out of the business. If you can get the money from the Northern Life on one of their policies, or both in time to do it better take me down to Riverside to be buried next to my brother and where the old folks will want to be ultimately. The other policies will be paid to you slower no doubt. Don't have the old folks come up if you can avoid it. Go down there to them and stay with them as much as you can, as they will need you and the little man to cheer them. Your car is at Stevens, 531 Washington Street. He will sell it or keep it for you. It is yours. The California land was deeded back to Mother for the place next to ours and the deed to it was made out to Ford but he will probably turn it into the bank. He was to cancel our \$1,000 note and grocery bill and give us the change out of the \$3,500 for it, but I presume that is off. Give them a deed to our home if they want it and reserve your furniture if you want it, and they will let you. Our timber tract sold to the Alger Lbr. Co. has an equity of \$62,000 in it but they will take it, and everything else except what is covered by mortgages. I thought we were worth \$200,000 and that the bank was solid as Gibralter, but after the Plamondon report we are not worth anything except what you keep out of my insurance money. Don't let the old folks turn any of their property as they are not responsible except for the assessment of \$500 on their stock. Have them send in the stock with the \$500 and let it go. Do the best you can to bring Sammy up right. I wouldn't let him go in the banking business as it is one lifelong worry and fight.

"I haven't been able to do very well for you but I have done the best I could at all times and if they had let me alone we would have been on easy street for everyone this spring.

"This is all I can think of now. Of course if I get home with the money and can get by this trouble all this should be destroyed and forgotten.

"You have been the sweetest wife any man ever had and I love you always. Try to keep Sammy and the folks from grieving all you can.

"With all the love in the world, I am,

"Yours, FRED."

(Pltffs' Ex. 16; 191, 192, 193, 195.)

At the same time Mr. Stewart wrote letters to Judge McKenney, Al Maurer and a Mr. Crouch of Kelso, enclosing each a deed to a quarter interest in a certain tract of land, the title to which stood in Mr. Stewart's name. This was done for the purpose of extinguishing debts that Mr. Stewart owed to the parties named. (90, 91, 92; Pltffs' Exs. 1 and 2.)

The evidence next takes up Mr. Stewart at the Union Depot in Portland, about the hour of 4 p. m. of the same day. When he arrived at the depot he was met by Robert Roberts, a colored porter, who knew him well. Mr. Roberts possessed himself of Stewart's grip and brief case, and with these articles started to make his way to the train, then about due to leave, which passes through Kelso on its run to Seattle. Mr. Stewart did not follow Mr. Roberts, who returned to where Stewart was standing and for the first time noticed that something unusual was wrong with Mr. Stewart. Says Mr. Roberts in his testimony:

"He (Stewart) just walked around a few steps and looked like he was in a great quandary, undecided which way to go, or what to do. Then he came up the steps and beckoned me to come out with his baggage. I came out with the baggage, and he said, 'Put it in this car here, the first one.' I said, 'Have you changed your mnd Mr. Stewart?' and he said, 'Yes, I have.' And with that he drove away. I never saw him again. He looked like he was in a deep study or had not reached a decision whether to go or not to go in that direction. That was unusual for him. * * *" (103-104.)

The evidence then loses sight of Mr. Stewart until about the hour of 6 o'clock p. m. of the same afternoon, when he was found by one Carl Hayes, a resi-

dent of Kelso, and who was well acquainted with Stewart, on board a train that leaves from what is known as the North Bank Station, in Portland, and runs to Astoria, Oregon. After Hayes discovered Stewart on this train he attempted to engage him in conversation, but Stewart requested Hayes to leave him as he wanted to get some sleep. (111-113.) Hayes complied with the request and went into another car. Testifying as to Stewart's condition Hayes says:

"His voice was changed and he was completely worn out, just like a man that had just got out of the hospital. There was no color in his face and no pep at all. He seemed to be worried and nervous, just a physical wreck; not the same man at all that I had known before." (112.)

The train on which Stewart was a passenger runs through the towns of St. Helens, Goble, and Rainier, in the order named. When the train reached St. Helens, which is some ten miles south of Goble, Stewart left the train. Why he did so no one knows. The train from which Stewart had disembarked had hardly left the station when he rushed up to a man by the name of Clyde Hanson, who was at the time driving an automobile for hire between St. Helens and other small towns situated on the Columbia River, and requested him to take him to

Goble and if possible to reach there ahead of the train that had just departed. (105.) This Mr. Hanson endeavored to do, but the train out-distanced him. Goble, it will be remembered, is the point where the trains formerly ferried across the Columbia River prior to the construction of the bridge at Vancouver. Kalama is on the Washington side and Goble on the Oregon side, and between the two a ferry service is maintained. At this point the Columbia River is over a mile wide. It is deep, wide, swift and treacherous stream, and on the night in question was some twelve or fifteen feet out of its banks and rising rapidly. (142.) After arriving at Goble, Stewart, while waiting for the boat to return from Kalama to Goble, went to the telephone and called up his home at Kelso. The call was answered by one Frank Sardam, an intimate friend of Mr. Stewart, who was at the time in Mr. Stewart's home at Kelso. When connection was secured, Stewart, says Sardam:

"wanted to know how Sam (his boy) and his wife were. * * * Towards the end of the conversation his voice kind of pitched up high, peaked out like a man who was sort of backing away from the phone. The unusual thing about his conversation was that his voice sounded like he was trying to control it. It was suppressed in some way." (121-122.)

Between Goble and Kalama a small ferryboat named the "Queen" plies the waters of the Columbia River. This boat left Goble for Kalama at the hour of 8:50 p. m. on that night, bearing Mr. Stewart as one of its passengers. On the following page we reproduce a photograph of this boat, which photo was offered and received in evidence and marked plaintiffs' exhibit 9 upon the trial in the lower court. The crew on this boat consisted of William Pomeroy, the pilot, and Paul G. Shotswell, the purser, both of whom were well acquainted with Stewart. On the boat were five other passengers, Jack Chisholm of Kalama, Washington, John Scanlon, Raymond Schorer and H. L. Curtis, all of Centralia, Washington, and a traveling salesman referred to in the evidence as "the drummer."

As the boat left the Oregon side Stewart stood on the prow of the boat until his fare was collected by Shotswell, the purser. (163.) As the boat reached the middle of the Columbia River, Stewart, with a sudden movement that attracted the attention of Pomeroy, (142) Chisholm (225), and others, suddenly left the prow of the boat, went into the cabin where Scanlon, Curtis and Schorer were seated, opened the door that gave access to a little platform on the rear of the boat (see Pltffs' Ex. 9)





which is boxed up so that it is impossible to walk around either side of the boat, and disappeared from human eye forever. Within a very brief space of time after Stewart had gone through the cabin of this boat on to the platform, Schorer and Curtis opened the rear door and walked out on to the back platform. Stewart was not there. These young men were not at that time acquainted with the construction of the boat, but they nevertheless were a little mystified over the disappearance of Mr. Stewart, whom neither knew. They returned into the cabin just as the boat reached the landing in Kalama, and as they went up the slip both asked Mr. Scanlon, who is and was at the time a timber cruiser in the employ of the Weyerhaeuser Timber Company, Schorer and Curtis being his assistants, "if the man that went out the door came back through the cabin," and upon Scanlon's replying in the negative one of them remarked, "Well, he must be in the river." (170.)

When the boat drew up to the landing in Kalama, Shotswell, the purser, as was his custom, stepped off the boat, and, facing the boat, held it fast to the side of the "Elf," which was lying next to the landing, while the passengers disembarked. Shotswell noticed that Stewart did not get off, and he

testified that it would have been impossible for Stewart to have left the boat without being observed by him. Shotswell, after he had noticed that Stewart had not left the boat, immediately called to Mr. Pomerov, the pilot, who was in the pilot house, and who had a full view of the passengers as they left the boat, and asked him "if Stewart got off," and upon receiving a negative reply either Shotswell or Pomeroy called to Captain Reid, who was standing at the head of the landing and asked him if he had seen Stewart and upon being told that he had not they made a thorough search of the boat, but Stewart was not to be found. His grip was in the pilot house, where he had placed it upon boarding the boat at Goble. After the search of the boat had been finished Captain Reid went to the telephone and called up J. W. Hoggatt, sheriff of Cowlitz County, and told him that "Stewart was overboard, went into the river." (197.) Continuing, the witness, Hoggatt, testified:

"I says, 'What Stewart?' He says, 'F. L. Stewart, the banker at Kelso,' I says, 'Are you positive?' He said, 'I am.' I asked him if he had looked on the boat, and he says, 'We have; we have searched the boat and he isn't there.'" (197.)

Captain Reid also phoned to William Stuart (no relation of the insured), prosecuting attorney of

Cowlitz County, and told him that Stewart: "jumped off the boat; committed suicide."

Captain Reid then instructed Mr. Pomeroy, the pilot of the boat Queen, to make a report to the government as required by statute, or the rules of navigation, that Mr. Stewart had been drowned while a passenger on the boat. (526.) Mr. Pomeroy, the pilot, testified that it was impossible for Stewart to have left the boat at Kalama without being observed by him. Among other things this witness testified as follows:

"When the boat got to the railing the passengers went ashore. I was standing in the window. The passengers had to pass by me or jump over the railing. The passengers all passed out but Stewart. I noticed his absence. I raised the alarm. I hollered up to Captain Reid and asked him if Stewart had come on to the slip. Captain Reid said, 'No, sir.' I then took my spotlight and searched the boat thoroughly. I could not find him. He left his grip in the pilot house and I took it up and checked * * No one could have it in the depot. passed from the Queen to the Elf without my seeing them during the landing of the passengers. The depth of the water from the rear of the Queen at the place we landed to the wharf is I think about fifteen or sixteen feet." (143, 160.)

After Mr. Stewart's disappearance a search was instituted for the body, and kept up for a period of

seventeen days. Captain Reid, owner of the boat "Queen" led in the search for the body. It was never found.

Upon the trial many witnesses who lived on the banks of the Columbia River for a period of time varying from twenty to forty years, testified that a great many persons were drowned in the waters of that river whose bodies were never recovered. On this phase of the case we call particular attention to the testimony of Dr. Byrd (130 to 140 inc.), Christ Hansen (201 to 206 inc.), G. H. Thayer (210). Dr. Byrd, who is a physician of many years' practice and at the time of the trial was chief medical adviser of the Industrial Insurance Commission of the state of Washington, testified:

"I lived in Kelso during the fourteen years I lived in Cowlitz County. I was county coroner of that county for a while. I held the office three and a half or four years. Practically the whole itme I was in Cowlitz County I was surgeon for the Hammond Lumber Company; they had camps from Oak Point as far as Carrolls Point, which is over a distance of thirty miles. I had a boat that was partly furnished by the company, that I might go up and down the river and look for the injured men, and I was on the river a great deal during the time I lived in Cowlitz County.

- "Q. While you were county coroner and while you were down there, a practicing physician, did you take any note or have you any knowledge as to how many persons were drowned in the waters of the Columbia and Cowlitz rivers, whose bodies were never recovered?
- "A. I could not state as to the exact number, but there were quite a large number that were never recovered. * * *

"I remember a number of * * * instances, just how many I could not say, of bodies that I had records of. I kept a scrap book, and I put all the clippings from newspapers in my file so we could use them for identification in case the bodies came in the big boom at the mouth of the Cowlitz River, because the current hangs on the Washington side, striking Carroll's Point, and leaving the Washington side below Mount Solo, and it is within that district that we used to get most of the bodies.

"I remember a case of where a girl named Mabel Londo and a man named Parker Day were driving at high speed across Columbia Slough. There was a curve in the bridge, and they didn't make the curve—went through the railing—and the automobile was found the next morning. Neither of the bodies was found. Many months after that I and an Indian got the girl out of a tree on Cottonwood Island. The bridge which I have just referred to is just opposite Vancouver, close to where the Union Meat Company's plant is now, and from Vancouver to Carroll's Point would be something

like forty miles, and I got her off Cottonwood Island, right opposite Carroll's Point. She was up in a tree. She had come in there on the high water. The water receded and left her up in the tree. The body of Day, so far as I know was never found.

"I have tried on four different occasions to resuscitate and bring back to life the bodies of persons who have fallen in either the Columbia or Cowlitz rivers. I never succeeded. One of the bodies had been in the water about eight minutes, another about thirty minutes, and the other two about ten minutes. The reason it was impossible for me to resuscitate the bodies was that the waters were so cold that the capillary circulation coagulates immediately, and you cannot re-establish the circulation by virtue of the coagulation of the capillary circulation.

"I don't think that if a person heavily clothed went into the Columbia River on the night of March 17th, 1,000 feet from the shore, the river being 12 feet out of the banks, and the water cold, as cold as I have described, that he could possibly survive. I think it would be too far for him to attempt to swim, even if he was a good swimmer." (130-131-132-133.)

It is undisputed that Mr. Stewart could not swim.

Christ Hansen testified in part as follows:

"My occupation is that of diver. I have been engaged in diving for ten years. I am familiar with the bottom of the Columbia River in the vicinity of Kalama. * * * The water runs all the way from thirty-five to sixty-eight feet in depth. The water on the 21st of March, 1921, was high, being about twelve feet above normal. The bottom of the river, starting in there and extending on through to Goble and below, is very rough in some places. It will form holes in banks at different places, there will be piles of snags,—that is trees, would pile up, drift down with high water, and eventually work a hole in the bottom of the river, and they will stop there and they will bury up, which will take several tons strain to pull them back out of the ground. * * * Some of these holes are pretty large, some not very large, some not over fifty feet across, but they will be from fifteen to twenty feet deep. * * * * If you go down the river to Coffin Rock about one mile the river is 180 feet deep.

"Q. Have you ever found bodies" * * in the bottom of the river when you were down there?

"A. I have. The only times that I can find them is when the river is very low. You take on high water it is no use. You can't work or you can't hardly stay there, and in quiet water along shore mostly are the places where I can find them. After anything lays in the bottom of the river for a few hours, when the river is * * rising and muddy, the sand moving will fill it over, shove it into a hole, probably, and that hole eventually fill over if it lays any length of time. * * I have found dead bodies in the Columbia River. I don't know exactly how many, but about ten. I have

seen two or three cases where I had to break them loose to get them out. * * * Quite a few people have been drowned in the Columbia River whose bodies have not been recovered. * * * I have looked for three myself, which were never found. I saw one person drowned whose body was never found.

- "Q. Take the condition of the water as you know it to be on the evening of March 17, 1921, do you think from your knowledge of the water that a man could live in the water very long if he should happen to fall overboard or get out of the boat with all of his clothing on?
 - "A. Not very well. It is pretty cold.
- "Q. Do you think a man would live very long that was in there?

"A. No." (201-202-203-204.)

Shortly after Mr. Stewart's disappearance the superior court of the state of Washington for Cowlitz County appointed Judge H. E. McKenney of Kelso, Washington, administrator of Mr. Stewart's estate. (90.) It was shown by the testimony of Judge McKenney, who was a witness upon the trial in the court below, that the estate was hopelessly insolvent. (90, 91, 92.) Judge McKenney and Mr. T. H. Adams, who was afterwards appointed receiver of the Kelso State Bank, both testified

that no claims had ever been filed by any person, firm or corporation against Mr. Stewart's estate, or against the bank by reason of any transactions with Mr. Stewart on March 17, 1921, or for many days prior thereto. This testimony was introduced for the purpose of showing that Mr. Stewart did not raise any money to tide over the affairs of the bank while in Portland on March 17, 1921. (186; Pltffs' Ex. 16.) After the appointment of the administrator of the estate Mr. Stewart's private box in the Kelso State Bank was opened and a letter was found, addressed to his wife, under date of March 15, 1921, which letter was offered and received in evidence on the trial and was marked plaintiffs' exhibit 17. (191.) It is unnecessary to reproduce this latter letter in this brief as it is in substance the same as plaintiff's exhibit No. 16.

The statment made in the brief of counsel for plaintiffs in error on page —, that on the 17th day of March, 1921, Mr. Stewart had "in full force and effect \$86,000 of insurance on his life," is perhaps misleading. All of the policies of insurance, other than the ones involved in this action and two small policies payable to his estate, provided that if the insured met death by his own act they would be void. Of course the accident insurance that he

carried was subject to the same excepted clause. The only collectible life insurance that he had at the time of his death was the amount involved in this proceeding, save as noted. However, Mr. Stewart seems to have labored under the idea that he carried life insurance to the extent of \$86,000 that would be payable when his death occurred, regardless of the cause of death. (Pltffs' Exs. 16 and 17.)

PROOFS OF DEATH

Immediately after the death of Mr. Stewart the insurance companies were notified of that fact. (Pltffs' Ex. 27.) On April 9, 1921, proofs of death were forwarded to the Mutual Life Insurance Company. (Pltffs' Ex. 18.) This exhibit is on a form furnished to the beneficiary by this insurance company. It sets forth the claimant's name, residence, date of birth, name of deceased and place of his birth, the date of his birth, the place where deceased met his death, his last residence, the name of the county where his estate is being administered, his occupation and the cause of death, and in all things is full and complete, save and except there is an absence of physician's or coroner's certificate,

which under the circumstances of course could not be made, the body never having been recovered. This proof of death was forwarded to the office of the Mutual Life Insurance Company in Seattle, Washington, but it was stipulated by counsel that the same was forwarded from the Seattle office to the home office of the company in New York. (216.) After receiving this proof of death the Mutual Life Insurance Company raised no objections of any kind or character whatsoever thereto.

On April 18, 1921, proofs of death were sent to the Prudential Insurance Company at Newark, New Jersey. (Pltffs' Ex. 28.) This proof of death is on a form furnished by the company and gave all particulars as to the death of the deceased as required in the printed questions. Upon receipt of this proof of death and under date of April 26, 1921 (Pltffs' Ex. 20), the Prudential Insurance Company acknowledged receipt of the same, and in a letter addressed to Mr. Frank Sardam, who on behalf of defendant in error had sent the company the proof of death, said:

"We have your April 18th letter, enclosing claimant's certificate of Mrs. Stewart. This statement of the beneficiary will hardly be considered proof of death, and we suggest that the beneficiary endeavor

to establish the death of the insured through circumstantial evidence by means of specially drawn affidavits."

On May 13, 1921, acting on the suggestion contained in the letter of the Prudential Insurance Company under date of April 26, 1921 (Pltffs' Ex. 20), defendant in error sent to the Prudential Insurance Company her specially prepared affidavit, detailing all the facts and circumstances connected with the claimed death of Mr. Stewart. (Pltffs' Ex. 29.) Separate identic affidavits were sent to cover each policy of insurance. In the letter transmitting this specially prepared affidavit Mr. Fitch, who wrote the same and who was at the time acting as one of the attorneys for the defendant in error, said:

"Complete proofs of loss under the terms of said policy heretofore have been sent you, but if at any time you desire and we can furnish you with any further or additional proof or evidence in this matter we stand ready to do so." (Pltffs' Ex. 29.)

A like affidavit of the defendant in error was also sent to the Mutual Life Insurance Company under date of May 13, 1921 (Pltffs' Ex. 26), although that company had made no request for any additional proofs.

Under date of July 13, 1921, specially prepared affidavits of Paul G. Shotswell, one for each policy of insurance, were sent not only to the Prudential Insurance Company, but to the Mutual Life Insurance Company as well. It will be recalled that Mr. Shotswell was the purser on the boat Queen on the night that it is claimed Mr. Stewart lost his life by being drowned in the waters of the Columbia River. In the affidavit of Mr. Shotswell all the facts and circumstances connected with the claimed death of Mr. Stewart are set forth and fully detailed. No objection whatever was made or pointed out by either of these companies to the affidavits of Mrs. Stewart, the defendant in error, and Paul G. Shotswell. They received and retained all proofs of death and affidavits in connection therewith, and raised no objection whatever thereto.

Not only did these companies fail to make any objection to the proofs of death, but the record affirmatively discloses that in June of 1921 they sent from the city of Chicago, Illinois, an investigator by the name of Francis K. Wilton to investigate the facts and circumstances connected with the death of Mr. Stewart. Mr. Wilton arrived in Kelso on June 3, 1921, and immediately entered upon his work. (354.) Thereafter Mr. Wilton went to the

prosecuting attorney of Cowlitz County, Washington, and endeavored to induce that official to issue a warrant for the arrest of Mr. Stewart on the ground that he was engaged in an attempt to swindle the insurance companies. (327.) This the prosecuting attorney refused to do because it was his firm belief that Mr. Stewart was dead (327-328.) Mr. Wilton thereafter extended his investigations from Kelso, Washington, to Hanford, San Francisco, Riverside, and San Diego, California, and the testimony gathered by him in the course of his investigations was used by each of the insurance companies in an effort to defeat the claim of the defendant in error. The twelfth finding of fact in each case, neither of which was excepted to, is as follows:

"That the said defendant * * * thereafter denied that the said Frederick L. Stewart was dead, and by its answer filed herein joined issue with the plaintiff on the allegation concerning the death of the said Frederick L. Stewart." (59, 64.)

On the trial in the court below no specific objection was interposed when the proofs of death submitted to these insurance companies prior to the commencement of this action were offered and received in evidence. The only objection to their intro-

duction was that they were "immaterial and irrelevant," or "incompetent, immaterial and irrelevant, and not tending to furnish proof of death." (213, 214, 215, 216.) The position of counsel for plaintiff in error at the time of the trial was stated by Mr. Rupp in these words:

"My position in the matter briefly is this. We wrote these policies. If this man is dead we are willing to pay them. If he is not dead we are not willing to pay them." (219.)

THE DEFENSE

The defense claimed that Mr. Stewart was not drowned on the night of March 17, 1921, and that subsequent to that date he was seen alive in the state of California. To substantiate this contention the testimony of George Elwood, Orvalle Onorato, Walter Comber, Benjamin Vienna, Spiro Papalian and others, is relied upon. Mr. Elwood lived in Kelso prior to 1906, following the avocation of a barber. He claimed that when he lived in Kelso he was well acquainted with Mr. Stewart. He says that since moving away from Kelso in 1906 he has seen Mr. Stewart three times, once in

1914, once in 1920, and again on or about March 23 or 24, 1921, at Hanford, California. He testified that he was in a barber shop at the latter place, and looking out of the window he saw Mr. Stewart leaving a nearby restaurant; that Stewart was in such a position that he could not see his face, but that he was satisfied it was Stewart. Shortly thereafter Mr. Elwood, who was at the time traveling for a barber supply house, left California and went to Oregon and Washington. When he arrived at Cottage Grove, Oregon, which is only a short distance from Portland, he testified that he first heard that the bank with which Stewart had been connected had failed, and that it was claimed that Mr. Stewart was dead. He had previously testified that he was very friendly with Mr. Stewart. About this time Judge Cushman took a hand in the examination of the witness, and the record discloses the following:

"THE COURT: I want to straighten out something. You came back to Cottage Grove after you say this man at Hanford?

"THE WITNESS: Not back to Cottage Grove, but on my way.

"THE COURT: You worked your way up until you got to Cottage Grove?

"THE WITNESS: Yes, sir.

"THE COURT: You say you got there about a month after?

"THE WITNESS: Something like that.

"THE COURT: How long were you there?

"THE WITNESS: I Sundayed there. I have a sister-in-law there.

"THE COURT: Mr. Stewart was not married when you were in Kelso—when you were barbering?

"THE WITNESS: No, sir.

"THE COURT: But he was married when you saw him in 1920?

"THE WITNESS: Well, I understood that he was. I never met him before.

"THE COURT: But you understood he was married?

"THE WITNESS: Yes.

"THE COURT: And you did not learn about the claim that he had been drowned until you got back to Cottage Grove?

"THE WITNESS: No, sir.

"THE COURT: How long after you got to Cottage Grove until you came to Kelso?

"THE WITNESS: Well, you see it would take several days because I made Portland. It was not very long.

"THE COURT: A week later?

"THE WITNESS: It would probably be a little more than a week.

"THE COURT: Two weeks?

"THE WITNESS: Well, somewhere around there. Sometimes I would take a week in Portland, but this time I only spent one day.

"THE COURT: After the time you learned at Cottage Grove that Stewart was supposed to be drowned, did you do anything to communicate with his wife or anybody at Kelso that you had seen him at Hanford?

"THE WITNESS: No, sir.

"THE COURT: Call your next." (277,278,279.)

After Mr. Elwood left Cottage Grove, Oregon, and after stopping one day in Portland, he arrived in Kalama, Washington, about May 6th. When he reached Kalama he went into a barber shop, conducted by a man by the name of Taylor, and while there stated that he had seen Mr. Stewart in California. He was asked by one George N. Campbell, a banker of that city, who was in the shop at the time, when it was that he saw Mr. Stewart in Hanford, California, and he replied by saying that it was on February 22, 1921. When asked why he knew that was the date he replied by saying that it was George Washington's birthday, and that all the stores in Hanford, save barber

shops and restaurants, were closed. (319, 320.) The witness also admitted on cross-examination that while in Taylor's barber shop in Kalama in May, 1921, he stated in the presence of several persons that he would not swear positively that it was Stewart he saw in Hanford, California. (270.) The statement of this witness that he had seen Stewart in California was further impeached by the testimony of Lawrence Perry (321), Russell Carothers (322), F. A. Byrd (323), Frank J. Sardam (330), Paul G. Shotswell (340), C. M. Taylor (341), all of whom testified that Elwood admitted to them that he was not positive and would not swear that it was Stewart he saw on the street of Hanford, California.

Next the defense offered in evidence the depositions of Benjamin Vienna, and Spiro Papalian, both of Hanford, California. Vienna is a barber, and it was in the shop where Vienna worked that Elwood was standing when he swore that he saw Stewart crossing one of the public streets of Hanford, California. Papalian is the owner of the restaurant out of which Mr. Elwood said he saw Stewart emerge. Neither of these witnesses had any previous acquaintance with Mr. Stewart. Vi-

enna was shown the old photograph of Mr. Stewart, taken some time prior to 1909, and he testified that:

"The picture marked defendant's exhibit "C" appears to be a customer who came into my shop the 23rd or 24th of March last. I served him, cut his hair. His hair was kind of crimpy. It was pretty long. * * * When I finished his hair was cut practically the same as presented in the picture, only a little closer. His hair was brown, and also some grey around the edges. (282.)

Spiro Papalian, the restaurant keeper, out of whose restaurant Mr. Elwood said that he saw Mr. Stewart emerge, testified:

"Defendant's exhibit "C" appears to be a picture of the man that was served in my restaurant March 23rd or 24th. It looks like exactly the party that was waited on." (279.)

On cross-examination Mr. Papalian testified:

- "I was in my restaurant during all the month of February, 1921. I went to Stockton during the first week in March, 1921. I left here Saturday.
- "Q. Referring now to defendant's exhibit 'C,' had you ever—that party that you say you think was in your restaurant, had he ever been in there prior to that time before?
- "A. About two or three meals he had been eating there before I left." (280.)

In just one sentence Mr. Papalian, the Greek restaurant keeper, completely exploded the theory of the defense that the person who took a meal in his restaurant on March 23rd or 24th, 1921, and whose hair was cut by Vienna on the morning of that day, and the person observed by Elwood coming out of this restaurant could possibly have been Stewart.

Next the defense took the depositions of Arthur E. Pooley, K. Hansen and F. C. Meyer, purser, first officer and captain, respectively, of the steamer Mazatlan, plying between California ports and Mexico. None of these witnesses had any acquaintance whatever with Mr. Stewart. They were each shown the old photograph of Stewart and testified that a person resembling the person shown in the photograph took passage on the Mazatlan, that left San Pedro on or about April 3rd or 4th, 1921, and debarked at Manzanillo, Mexico, which port the ship Mazatlan reached on April 20th, 1921. Pooley, the purser, testified that the person on board had hair that

"was brown as mine, or light hair. It was a mixture of color, a mixture of brown with a little grey in it. You might call it sandy, but not red, a mixture of brown. It was wavy. He had it cut the same style as exhibits 'A' and 'B' * * *

I had occasion to see him every day and did see him every day. He ate at the same table with me, he talked with me there. He sat opposite me at the table. * * * I didn't notice about this man's teeth. I didn't notice anything peculiar about his teeth." (294, 295, 296.)

Hansen, the first mate, testified:

"We had a person on that boat which this appears to be a picture. His hair was wavy. It was something like mine, brown. It was light brown.

* * I will not swear that the man who was on board ship that I have been testifying about is the man shown in the photo." (297, 298.)

Mr. Meyer, the captain, testified:

"Exhibit 'A' appears to be a likeness or a picture of a passenger on that trip. * * * I don't know whether his hair would be blonde or red, or whatever he would call it, light anyway. * * * I should say he had long hair, well combed. * * * I believe we had a few games of penny ante with this man around a small deal table * * * I didn't notice anything out of the ordinary about this man's teeth. * * * I will not swear this is a photo of the man that was on the ship." (299, 300.)

The record discloses that the steamer Mazatlan landed at Manzanillo, Mexico, on *April 20th*, 1921. We call the particular attention of the court to this date so that it may readily appreciate what

next follows in this statement. It is this: The defense took the deposition of Orvalle Onorato, who once lived in Kelso, Washington, and who said he was acquainted with Mr. Stewart, but who had recently spent several years of his life in Italy. Mr. Onorato said that he was driving through the streets of Pasadena, California, in an automobile on April 26, 1921, just before noon, having left San Bernardino that morning, and that he observed Mr. Stewart on one of the streets of that city. On cross-examination the witness testified that:

"Before I had made positively sure it was him (Stewart) I had passed him." (219.)

Further the witness admitted that he was in Kelso, Washington, on May 23, 1921, and for thirty-six days thereafter, and that while there he told J. S. Robb, a resident of that place, that he would not swear the person he saw in Pasadena was Mr. Stewart. He further admitted that while in Kelso he talked to Judge McKenney, the administrator of Mr. Stewart's estate, who wanted him to sign an affidavit that he saw Stewart in Pasadena on April 26, 1921, but that he refused so to do, assigning as a reason that "I didn't want to be bothered." (293.)

Further testifying, this witness said:

"I believe I was in San Bernardino on the night of April 25; don't remember what hotel I stopped at; don't remember how much I paid for my room;

* * * don't know the first name of either one of the Hall boys; I believe I met the Hall boys on the afternoon of April 25, 1921. * * * They took me home with them; I have forgotten where they live; I only remained there a few minutes on the afternoon of September 25, 1921; I don't know where I went after I left their place; I don't remember the kind of a hotel that I stayed at on the night of April 25; I don't remember what part of the town the hotel was in; I can't say how many times I had been in San Bernardino prior to April 25. I made frequent trips there. * * *

"I saw Mrs. Stewart in Elsinore after I returned from Kelso to March Field. I returned from Kelso about the 1st of July. I saw her on the streets. * * *"

(At the time this witness says he saw Mrs. Stewart on the streets of Elsinore, California, the testimony is quite conclusive that she was in Los Altos, California, some eighteen miles from San Jose, and 400 miles or more distant from Elsinore, having left Elsinore on June 14, 1921.) (353.)

Next the defense called Harry E. Moores, a railroad ticket agent, who testified that he was familiar with the time table of the Mexican rail-

roads, and also of the railroads in the United States, and that a person landing in Manzanillo, Mexico, on April 20th could, traveling by way of El Paso, Texas, reach Los Angeles in approximately five days. On cross-examination he admitted that it would take four days to make the trip from Manzanillo, Mexico, to El Paso, Texas. (308.)

Next the defense called Walter H. Comber as a witness on their behalf. Mr. Comber, who at the time of the giving of his testimony was a resident of Riverside, California, testified that in 1914 he was living in Seattle, and that he was engaged in running an automobile for hire between that city and Rainier National Park, and that in the summer of 1914 he drove Fred Stewart from Seattle to the last named place. Mr. Comber further deposed that after having driven Mr. Stewart to Rainier National Park in the year 1914 he met him several times thereafter in Seattle. Continuing, the witness testified that in the month of August, 1921, he observed Mr. Stewart on two separate occasions walking around the streets of Pasadena, California. In rebuttal and impeachment of this witness's testimony it was shown that Mr. Comber was sentenced by the superior court of the State of Washington, for King County, to

serve a term of three years in the State Penitentiary at Walla Walla, Washington, for burglary. (315.) It was further shown by the testimony of Judge Smith of the superior court of King County, Washington (313, 314), Edwin C. Ewing, corporation counsel of the city of Seattle (315), Charles F. Riddell, attorney-at-law and formerly United States district attorney for the Western District of Washington (315), and S. W. Taggart (315), manager of the Seattle Taxicab Company, that Comber's reputation for truth and veracity is worthless. It was further disclosed that in addition to being a convict Comber deliberately perjured himself when he swore that he drove Fred Stewart to Rainier National Park from Seattle in the year 1914. It was conclusively shown that the first trip that Mr. Stewart ever made to Rainier National Park was in the summer of 1919; that during the spring, summer and fall of 1914 his wife was sick with a tubercular affection, confined to her bed for that period of time, and that Mr. Stewart was not out of the city of Kelso over night for the same period. (350, 351.)

John Reid was also called as a witness by the defense. Mr. Reid is the owner of the ferry boat Queen, on which Mr. Stewart was a passenger on

the night of March 17, 1921. Mr. Reid testified that he was standing at the top of the slip (see exhibit ——) when the "Queen" landed at Kalama on that night, and he testified that, "According to my count six passengers came up the slip." (231.) Mr. Reid was well acquainted with Mr. Stewart but did not testify nor attempt to testify that Mr. Stewart got off the boat. The testimony shows that the landing was well lighted on the night in question.

In impeachment of the testimony of Mr. Reid it was shown by the testimony of Lawrence Perry (321), Grover L. Thornton (324), J. W. Hoggatt, sheriff of Cowlitz County (197, 198, 325), William Stuart, prosecuting attorney of Cowlitz County (327), Edward White, deputy sheriff of Cowlitz County (326), and W. S. Carson (329), that Mr. Reid had stated to them that only five persons got off the boat on the night in question. It was further shown by the testimony of Mr. Reid himself that he joined in the search for Mr. Stewart's body and spent seventeen days in making that search. When he was also asked on cross-examination why he did not tell the sheriff and the prosecuting attorney of Cowlitz County that six persons got off the boat on the night of March 17th he replied by saying: "I wouldn't tell them anything." (255.) He admitted that some time after Mr. Stewart's disappearance he told Mrs. Stewart that he would do all he could to help her. When asked why he had changed his mind he answered as follows:

"I seen the poor people that had suffered in this case and lost their money, and was destitute, and my know that those six men come off the boat, why should I shield this man if he was the sixth man? Why should I do it? Therefore I changed my mind. Mrs. Reid told me, she says, 'Jack, you are a fool for to stand this thing, to spend your money and your time on this man's body when you know there were six men got off that boat,' and that is why I changed my mind."

"Yes, I searched the river for seventeen days with my boat, hunting for Stewart's body. I did that to convince myself, to make sure that Mr. Stewart was not in the river. Yet I told nobody but Mrs. Reid." (254, 255.)

Within a few minutes the witness gave another reason as to why he changed his mind to do what he could do to help Mrs. Stewart. He says:

"I wanted to keep it forever a secret that six men got off the boat, but I changed my mind. I changed my mind the day they refused to send me that 100 gallons of oil, which was about the 15th of April. I then told Mrs. Reid and nobody

else until about the 15th of March, 1922. I then told Mr. Bryce. At the time I told him we were in his office at Portland. Mr. Bryce is here in the court room." (258.)

ARGUMENT

Ι

Sections 649 and 700 of the Revised Statutes provide as follows:

"Sec. 649. Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." (Comp. St. 1918, Sec. 1587.)

"Sec. 700. When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the

sufficiency of the facts found to support the judgment." (Comp. St. 1918, Sec. 1668.)

For the abolition of the circuit courts and the transfer of their powers and duties to the district court see sections 1266-1268 of the Compiled Statutes of 1918.

"These statutory provisions," said this circuit in United States vs. Columbia & Nehalim River Railroad Co., a corporation, 274 Fed. 625, "are perfectly plain. The first cited is to the effect that where in an action at law a jury is duly waived and the trial had to the court the findings of the latter may be either general or special, and, whether the one or the other, shall have the same effect as the verdict of a jury; and section 700 is to the effect that where such an action is so tried and determined by the court without the intervention of a jury, the rulings of the court in the progress of the trial if excepted to at the time and duly presented by bill of exceptions may be revised upon a writ of error or upon appeal; and when the finding is special such review may extend to the determination of the sufficiency of the facts found to support the judgment."

Having in mind this language as used by this court in the case cited, the proposition recurs, what questions are here presented for review? The statute seems plain and unambiguous. The reviewable questions may be stated as follows:

- 1. Rulings of the court during the progress of the trial if excepted to at the time and presented by a bill of exceptions; and,
- 2. The sufficiency of the facts found to support the judgment.

This section (700) has often been construed by the supreme court of the United States in a series of decisions that admit of no doubt as to their meaning. We cite:

Boogher vs. N. Y. Life Ins. Co., 103 U. S. 90, 97; 26 L. Ed. 310.

Norris vs. Jackson, 9 Wallace 125; 19 L. Ed. 608.

Martinton vs. Fairbanks, 112 U. S. 670; 28 L. Ed. 862.

Lehnen vs. Dickson, 148 U. S. 71; 37 L. Ed. 373.

Dooley vs. Pease, 180 U. S. 126-131; 45 L. Ed. 457.

Wilson vs. Merchants L. & Tr. Co., 183 U. S. 121, 127; 46 L. Ed. 113.

In all of these cases it is held that it matters not whether the finding be general or special, it has the same effect as the verdict of a jury, and in the circumstances in which it is given is conclusive and prevents any inquiry as to whether it is sustained by the evidence.

In Boogher vs. N. Y. Life Ins. Co., supra, we read:

"We have often held that the act of 1865, Sec. 649-700, Rev. St., does not permit us to consider the effect of the evidence in the case, but only to determine whether the facts found on the trial below are sufficient to support the judgment, and to pass on the rulings of the court in the progress of the trial presented by bill of exceptions. For all the purposes of our review the facts as found and stated by the court below are conclusive." (26 L. Ed., p. 312.)

A concise and correct statement as to the effect of findings, both general and special, in a trial by the court is found in Lehnen vs. Dickson, *supra*, and we excerpt from the body of the opinion the following:

"Sections 648 and 649 of the Revised Statutes, while committing generally the trial of the issues of fact to a jury, authorize parties to waive a jury and submit such trial to the court, adding that 'the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.' But the verdict of a jury settles all questions of fact. As said by Mr. Justice Blatchford, in Lancaster vs. Collins, 115 U. S. 222, 225: 'This court cannot review the weight

of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered.' The finding of the court, to have the same effect, must be equally conclusive and equally removed from examination in this court the testimony given on the trial. Insurance Co. vs. Folsom, 18 Wall. 237; Cooper vs. Omohundro, 19 Wall, 65. Further, Section 700 provides that 'when an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to Section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal; and when the finding is special the review may extend to the sufficiency of the facts found to support the judgment.' Under that, the rulings of the court in the trial, if properly preserved, can be reviewed here, and we may also determine whether the facts as specially found support the judgment; but if there be no special findings there can be no inquiry as to whether the judgment is thus supported. We must accept the general finding as conclusive upon all matters of fact, precisely as the verdict of a jury. Martinton vs. Fairbanks, 112 U. S. 670."

In Dooley vs. Pease, supra, we find this statement:

"Where a case is tried by the court a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different."

Other quotations to the same general effect as the foregoing could be extracted from the cases cited, but we think the ones given will suffice.

In addition to the cases cited from the supreme court of the United States, holding that the inquiry in cases tried by the court without the intervention of a jury, where the findings are special, prevents any inquiry in this court as to whether the finding is sustained by the evidence, we cite and rely on:

York vs. Washburn, 127 Fed. 564.

Hughes County vs. Livingston, 104 Fed. 306.

Jackson vs. Mutual L. Ins. Co., 186 Fed. 447, 449.

Hill vs. Woodbury, 49 Fed. 138.

Farwell vs. Sturges, 56 Fed. 782; 6 C. C. A. 118.

Reed vs. Stapp, 52 Fed. 641; 6 C. C. A. 244.

Walker vs. Miller, 59 Fed. 867; 8 C. C. A. 331.

Ins. Co. of N. A. vs. Int. T. Co., 71 Fed. 88; 17 C. C. A. 619.

Munchen vs. Hart, 72 Fed. 294; 18 C. C. A. 570.

Woodbury vs. City, 74 Fed. 205.

Randle vs. Barnard, 81 Fed. 682; 26 C. C. A. 568.

Jones vs. McCormick, etc., 82 Fed. 295; 27 C. C. A. 133.

Hartman vs. Montana N. R. Co., 83 Fed. 27.

Hage vs. Magnes, 85 Fed. 355; 29 C. C. A. 564.

Fales vs. N. Y. Life Ins. Co., 98 Fed. 234; 39 C. C. A. 38.

In all these cases from the different circuits it is uniformly held that it makes no difference in the cases tried by the court without the intervention of a jury, even where the findings are special, the appellate court is under Section 700 limited to the inquiry as to "whether the facts found are sufficient to support the judgment." As was well stated in the case of Insurance Co. of N. A. vs. Int. T. Co., 71 Fed. 88:

"When a jury is waived and the court makes a special finding the appellate court cannot look into the evidence except to ascertain whether there was error in admitting or excluding testimony." And in Munchen vs. Hart, supra:

"The circuit court of appeals has no authority in any case to examine the testimony with a view of determining whether it was sufficient to support a finding of the trial court to which a case has been submitted without a jury."

From Randle vs. Barnard, supra:

"Where there is a special finding of facts, the appellate court will only consider whether upon such facts the judgment was correctly rendered."

In Woodbury vs. City, etc., supra, we find it held that:

"In an action at law tried by the court without a jury, assignments of error which would involve an examination of the evidence cannot be considered by the appellate court."

All the other cases cited by us from the various circuits are precisely to the same effect.

However, it seems that this circuit in the case of Schoenwald vs. Bishop, 244 Fed. p. 715, has held that in cases where a jury has been waived, and the action tried by the court, its inquiry will extend to an examination of the evidence, not for the purpose of determining whether the findings are supported by a preponderance thereof but only

for the purpose of determining whether the findings are supported by any evidence.

While we believe that the limitation upon this court's authority is limited to the determination of whether or not the findings made by the trial court support the judgment, we do not shrink from an examination of the record to ascertain whether there is any competent evidence to support the findings, and if that examination discloses that the findings are supported by any competent evidence the inquiry is at an end. The only other matter open to review is whether or not any prejudicial error was committed in the reception or rejection of testimony.

Counsel for plaintiffs in error attempt to predicate error upon the refusal of the trial court to make certain findings of fact and conclusions of law proposed by them, but the refusal of the lower court so to do is not subject to exception and review.

Schoenwald vs. Bishop, 244 Fed. 715.

Hathaway vs. First Nat'l Bank, 134 U. S. 494; 33 L. Ed. 1004.

The Francis Wright, 105 U. S. 381, 389; 26 L. Ed. 1100, 1102.

Nashville Int. Car Co. vs. Barham, 212 Fed. 635.

We think it a work of superogation to attempt any review of the testimony upon which the finding of the death of the insured is predicated. We have in our statement of the case quoted freely from the testimony of the various witnesses, and it will perhaps serve no useful purpose to again enter into details. The major question before the court for determination if we accept the rule laid down by this circuit in Schoenwald vs. Bishop, supra, may be thus stated: Is there any testimony to support the finding that Frederick L. Stewart, the insured, met his death by drowning in the waters of the Columbia River on the night of March 17, 1921? And, further, is there any testimony that proofs of death were presented to the insurance companies prior to the commencement of this action, and were the proofs of death sufficient to enable the companies to consider their rights and liabilities? If it be found from an examination of the record that there is any evidence to sustain these findings, then the inquiry is at an end.

We will discuss theses questions and the question of alleged error in the admission of testimony in the order presented by counsel for plaintiffs in error.

II.

Specifications of error 5 to 18 deal with the question of the sufficiency of the proofs of death submitted by defendant in error to the insurance companies prior to the institution of this action. It is contended by learned counsel for these companies, notwithstanding their explicit admission made on page 16 of their brief, that "at all times plaintiff in error denied liability solely on the ground that Stewart was not dead," that the judgment entered in this action should be reversed because of some alleged insufficiency or defect in the proofs of death. The only authority relied upon by counsel to sustain such a contention is the case of Asbury vs. Saunders, 68 Am. Dec. 300. An examination of the decision in that case discloses that it is without the slightest relevancy and signally fails to touch the precise point here involved.

We agree with the statement excerpted from the case of Crotty vs. Union Mutual L. Ins. Co., 144 U. S. 621, cited on page 15 of counsel's brief that: "sufficiency in form only is admitted by retaining the proofs without objection. The truth of

the statements contained in the proof is not admitted."

But what, may we inquire, has this principle to do with the question under consideration? Counsel leave us in the dark.

There are three all-sufficient answers to the contention that the judgment in these actions should be reversed because of any alleged defect or insufficiency in the proofs of death. They are as follows:

- 1. The proofs were neither insufficient or defective.
- 2. The plaintiffs in error waived any right they had to object to the proof of death as insufficient or defective by retaining the same and failing to specifically point out any defect or note any objection thereto.
- 3. They waived the necessity for submitting any proofs of death whatever by their sustained contention that Stewart is and at all times since March 17, 1921, has been alive.

It is held by all the authorities and denied by none that no particular form of loss under a policy of insurance is required as long as the proof is sufficient to enable the insurer to consider its rights and liabilities.

O'Brien vs. Ins. Co., 212 Fed. 102.

Lesser vs. N. Y. Life Ins. Co., 200 Pac. 22.

Glazer vs. Ins. Co., 190 N. Y. 6; 82 N. E. 827.

Globe & Rutgers Ins. Co. vs. Prairie Oil & Gas Co., 248 Fed. 452; 160 C. C. A. 462.

Merchants Ins. Co. vs. Ford, 269 Fed. 771.

Neither on the trial below nor in the brief of counsel are we advised in what respect the proofs of death are defective or insufficient. As noted in our statement of the case, the original proofs of death were made out on forms furnished to the defendant in error by the insurance company, and there is no contention that the printed questions contained on those forms were not truthfully, fully and fairly answered. Afterwards the specially prepared affidavits of Mrs. Stewart, the defendant in error, and Paul G. Shotswell, who was the purser on the boat Queen on the night of March 17, 1921, were sent to the insurance companies, and all these documents were kept and retained by them and no objection of any kind ever registered against their form or sufficiency.

What, then, is the rule? Assuming for the sake of the argument that the proofs of death were defective, these companies

"by accepting and retaining proofs which are not such as are required by the contract, the company waives objection thereto."

25 Cyc. 886, note 63.

Under note 63 of the authority just cited we read:

"Notice of objection should be promptly given if the proofs furnished are not such as required." citing Insurance Co. vs. Mahone, 56 Miss, 180; Peacock vs. N. Y. Life Ins. Co., 1 Bosw. (N. Y.) 388; Galdenkirch vs. U. S. Mutual Acc. Assn., 5 N. Y. Sup. 428.

And it is further stated that:

"Requiring further information will be a waiver of defects in other respects in the proofs furnished," citing Standard L. Ins. Co. vs. Davis, 59 Kansas 521, 53 Pac. 856; McElroy vs. Life Ins. Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Repts. 400.

These latter authorities are peculiarly applicable in the case against the Prudential company, as that company after the receipt of the proofs of death (plaintiff's exhibit 28) requested that the beneficiary forward "specially drawn affidavits"

(plaintiff's exhibit 20), to establish the death of the insured. This, as we have noted in our statement of the case, was done, and thereafter no objection was raised by the company either to the formal proofs of death or to the specially drawn affidavits.

When the specially prepared affidavits of Mrs. Stewart, the defendant in error, were sent to these companies they were accompanied by a letter signed by Mr. Fitch, one of the counsel for defendant in error (see plaintiff's exhibits 25 and 26), in which letters it was stated:

"Complete proofs of loss under the terms of said policy heretofore have been sent you, but if at any time you desire and we can furnish you with any further additional proof or evidence in this matter we stand ready to do so."

Neither the Mutual nor the Prudential saw fit to even answer Mr. Fitch's letter, nor did they demand any other or further additional proof or information. Notwithstanding this fact, counsel for defendant in error afterwards sent the specially prepared affidavit of Paul G. Shotswell to both companies.

In this connection it is well to note that the authorities hold that:

"The assured does not waive a waiver of proofs of loss by afterwards furnishing the proof."

Warshawky vs. Anchor Mut. F. Ins. Co., 98 Iowa 221, 67 N. W. 237.

In Fidelity Phoenix Ins. Co. vs. Sadan, 178 S. W. p. 561, the Texas Civil Court of Appeals, speaking to the question we have been discussing, says:

"We believe that the authorities support the proposition that before an insurance company may defeat a claim for liability for loss because of any inaccuracy or any other defect in the proofs of loss submitted it must point out to the claimant the respects in which it is claimed such proofs are inaccurate and a failure on the part of the insurance company so to do within a reasonable time will constitute a waiver of such alleged defective proof."

See also Wood on Insurance, sec. 452 (2nd Ed.) and authorities cited in note 1, page 962.

In Great American Fire Ins. Co. vs. Jenkins, 76 S. E. at page 160 the Court of Appeals of Georgia says:

"If for any reason the proofs were insufficient or lacking in fulness or in specific compliance with the terms of the policy, the failure of the insurer to object and point out the defects amounted to a

waiver of the right to demand strict compliance with the contract. * * * *"

In Thaxton vs. Metropolitan L. Ins. Co., 55 S. E. 419, the Supreme Court of North Carolina says:

"Defendant's first objection rests upon the allegation that no satisfactory proof of the death of the insured has been made; that the requirements of the policy as to the form and quantum of proof has not been fully complied with. We fail to discover any essential defect in the matter referred to; but if such defect existed we do not think the objection is now open to defendant * * * and as to the form to which this objection is chiefly alleged, it is well established that when proofs of death have been formally made and the company retains them without suggesting any defect or failure in this respect to comply with the requirements of the policy and finally refuse to pay the claim, it thereby waives any defect in the formal proof of death and acknowledges that the requisite proofs were received by it. * * * Here proof of death was made on blanks supplied by the company in July, 1905. So far as the testimony shows no objection or suggestion was made as to the proof until answer filed in November following, denying liability on the policy. * * * * Under such circumstances the objection as to the form of the proof is properly held to be waived."

In Bingell vs. Royal Ins. Co., 87 Atl. at p. 955, the facts disclose that the defendant insurance company kept and retained the proof of loss submitted to them for over one month without making any objection. At the trial it insisted that the proofs were insufficient, but the Supreme Court of Pennsylvania disposed of such contention by cryptly remarking that:

"An insurance company which retains proofs of loss without any objection for over a month will be presumed to have waived defects." citing many authorities.

In Failes vs. Detroit Fire & Marine Ins. Co., 141 N. W. at 882, the Supreme Court of Michigan says:

"The objection made to the first proofs was general and not specific and plaintiff undertook to and did furnish further proofs of loss which were received by defendant, and no further objection was made that they were unsatisfactory and insufficient in any particulars. By remaining silent and calling for no further information defendant is estopped from claiming upon the trial that these proofs of loss were defective."

In Jones vs. Lumber Ins. Co. of N. Y., 118 S. W. at p. 115, the Supreme Court of Missouri holds:

"If an insurance company is unsatisfied with the proofs of loss furnished by the insured he must be notified of the company's objection and afforded an opportunity to make corrections if enough time is left of the period in which proof is to be furnished for notice to be given."

In Wakeley vs. Sun Ins. Co., 92 Atl. 137, the Supreme Court of Pennsylvania holds:

"The proofs of loss were delivered to the defendant within the time stipulated in the policy, and as we must assume in good faith as a compliance with the provisions of the policy, and it was the duty of the company to give immediate notice to the assured of its objection to the proofs, pointing out the defects. * * * And if the company neglected to do so its silence will be held a waiver of such defects in the proofs, and they must be considered as and having been duly made according to conditions of the policy. * * * "

From 14 R. C. L. Sec. 523 we excerpt the following:

"Where a policy requires preliminary proofs of loss and they are presented in due time, but are defective, such defects may be waived by the failure of the insurer to object to them on any ground within a reasonable time."

Next we contend that when these companies denied liability, and their counsel admits they did, (brief p. 16) and the uncontradicted testimony is that Mr. Wilton, their agent, endeavored long

before the institution of these actions to induce the Prosecuting Attorney of Cowlitz County to issue a warrant for the arrest of Mr. Stewart, contending that he was alive and presumably engaged in a conspiracy to defraud them, they absolutely waived the necessity for submitting any formal proofs of death whatever. Let it also be noted as we proceed that when these companies filed their answers in these cases they denied on oath that Stewart was dead. Let it also be further noted that the trial court made the following finding of fact:

"That the said defendant * * * thereafter denied that the said Stewart was dead, and by its answer filed herein joined issue with the plaintiff on the allegations concerning the death of the said Frederick L. Stewart." (59,64).

This finding is not excepted to.

There is no principle better settled in the law of insurance than that a denial of liability is a waiver of proofs of loss or proofs of death, as the case may be.

Royal Ins. Co. vs. Martin, 192 U. S. 149, 24 Sup. Co. 247, 48 L. Ed. 385.

Knickerbocker Life Ins. Co. vs. Pendleton,112 U. S. 696, 709, 5 Sup. Ct. 314, 28 L.Ed. 866, 870.

Fidelity & Cas. Co. of N. Y. vs. Dulaney, 91 Atl. 574.

Price vs. North Am. Acc. Co., 152 Pac. 805.

U. S. Health & Acc. Co. vs Harvey, 129 Ill. App. 104.

Hays vs. Gen. Assembly, 104 S. W. 1141.

Phenix Ins. Co. vs. Kerr, 129 Fed. 723.

Commercial Union vs. King, 156 S. W. 445.

Ins. Co. vs. Forelines, 126 S. W. 719.

Ins. Co. vs. Donelan, 66 Pac. 249, 26 C. J. 407, 409, 410.

In Royal Ins. Co. vs. Martin, 192 U. S. 149, 24 Sup. Ct. 247, 48 L. Ed. 385, the Supreme Court of the United States says:

"A general, absolute refusal to pay in any event or a denial of all liability under its policy of insurance dispensed with such formal proofs as a condition of its liability to be sued and opened the way for a suit by the assured in order that the rights of the parties could be determined by the courts according to the facts as disclosed by the evidence. It was so held by this court in a case of fire insurance (Tayloe vs. Merchants F. Ins. Co.., 9 How. 390, 403, 13 L. Ed. 187, 192); and the same principle was recognized as applicable in a case of life insurance. (italics ours) Knickerbocker L. Ins. Co., vs. Pendleton, 112 U. S. 696, 709, 28 L. Ed. 866, 870, 5 Sup. Ct. 314. To the same effect are authorities cited by the text writers. * * * *"

It has also been held that a denial of liability, although first made in the insurer's plea or answer, constitutes a waiver of notice and proofs or defects therein.

Rochester German Fire Ins. Co. vs. Schmidt, 151 Fed. 681.

Ins. Co. vs. Allis, 53 Pac. 294.

St. Louis Ins. Co. vs. Kyle, 49 Am. Dec. 74.

Ins. Co. vs. Fallon, 63 N. W. 860.

Gash vs. Ins. Co., 153 Ill. App. 31.

Ins Co. vs. Tennant, 144 Ill. App. 30.

Phenix vs. Kerr, 129 Fed. 723.

From 26 C. J. at p. 407, we extract the following:

"It is generally held that a denial of liability or a refusal to pay, not predicated upon the failure to furnish proof, is a waiver of any objection on that ground, irrespective of whether the denial *precedes or follows* (italics ours) the time within which the proofs should have been submitted."

In Knickerbocker L. Ins. Co. vs. Pendleton, 112 U. S. 709, 28 L. Ed. at page 870, we read:

"The preliminary proof of loss or death required by a policy is intended for the security of the insurers in paying the amount insured. If they refused to pay at all, and based their refusal upon some distinct ground without reference to the want or defect of the preliminary proof, the occassion for it ceases and it will be deemed to be waived. And this can work no prejudice to the insurers, for, in an action on the policy, the plaintiff would be obliged to prove the death of the person whose life was insured, whether the preliminary proof was furnished or not."

III

The next question discussed in the brief of counsel for plaintiffs in error relates to the admission of testimony which is comprehended in specifications of error 1, 2, and 4. To an intelligent understanding of these specifications of error it is necessary to make a peliminary statement.

Mr. Hay, the State Bank Examiner, accompanied Mr. Stewart, the insured, to Portland on the morning of March 17th, 1921. He had been with him almost continuously from March 16th, 1921, at the hour of 9 P. M. to March 17, 1921, at the hour of 10 A. M. He knew Stewart's condition, both physical and mental. When he returned from Portland to Kelso and closed the bank he testified:

"I found in the bank three or four pistols and a sawed off shotgun. I unloaded them.

"Q. Why?

"MR. KEENAN: If the court please, we object to that as wholly immaterial.

"THE COURT: Oh, he may answer. I don't see the materiality of that. He can answer it more quickly than discuss it probably.

"A. I wanted to remove any opportunity that Mr. Stewart might do something rash. I was a little concerned as to what he might do." (85.)

Continuing his testimony, the witness said:

"I worked at the bank until somewhere around 9 o'clock (March 17, 1921) and then went to my hotel. While there George Plamondon called me up and asked me if I would come to his house. I said I would come down if he wanted me to. * * *

"Q. What did you hear? What did he tell you?

"Mr. Rupp: Objected to on the ground that it is immaterial.

"THE COURT: Objection overruled. * * *

"A. When I stepped on the porch of Mr. Plamondon's house the door was open, and as I stepped in he said, 'Well, Fred has done it.' I said, 'Did he shoot himself?' And he said, 'No, he went in the river.'" (86.)

Mr. Plamondon testified that he communicated his knowledge of what had happened to Stewart to Mr. Hay immediately after he heard of that event.

The admission of this testimony, excluding the reason assigned by Mr. Hay for unloading the pis-

tols when he closed the bank, can be defended upon the broad proposition that it was a part of the res gestæ. Counsel for the plaintiffs in error contend that it was not a part of the res gestæ because "they (Hay and Plamondon) were miles away, and whatever had occurred had occurred some considerable time before. Their statements were not therefore statements arising from a shock." This, then, is the present objection urged against the admission of the testimony complained of. On the trial the objection to its admission was based upon the ground that it was "immaterial." Such an objection is not well taken.

An objection to evidence that it is incompetent, without stating in what its incompetency consists, is insufficient, and it will not be sufficient to object that evidence is "inadmissible and incompetent," or "immaterial and incompetent," or "immaterial and irrelevant," or "irrevelant and immaterial."

8 Vol. P. & P. 227 and 228.

Objections should always state the grounds thereof, and should present to the court the precise point relied upon by the party objecting. In the language of some of the decisions the party must lay his finger upon the point of objection. He must not merely complain in a general way and say to let in certain evidence will hurt his case and that under the law it ought to be excluded, and leave the judge and opposite party in the dark as to what principle of law he relies on and compel them to decide haphazard, or else stop the trial of the case while counsel examine the whole body of the law from the earliest judicial exposition down to the latest act of the legislature to see if they can discover any valid objection to the testimony.

8 Vol. P. & P. 218, et seq.

Counsel having objected to the testimony complained of on the sole ground that it was "immaterial" has waived any other objection that might be raised to the same.

> Smith vs. Bean, 46 Minn. 138. Triggs vs. Jones, 46 Minn. 277. Bailey vs. R. R. Co., 3 S. D. 531. Ladd vs. Sears, 9 Ore. 244.

Fulton Ins. Co. vs. Goodman, 32 Ala. 108. However, the statement made by Plamondon to Hay, immediately upon hearing that "Stewart went into the river," was a part of the res gestæ, notwithstanding that they were not present at the place where the event actually occurred. They

were acquainted with many of the facts and circumstances leading up to Stewart's death.

"The term 'res gestæ' has, however, frequently been given a greatly extended application, and has been defined as 'those circumstances which are the undesignated incidents of a particular litigated act and which are admissible when illustrative of such act.' It has been made to embrace all facts which are relevant to the principal fact in any degree, as tending to establish the existence of the claim or liability in dispute between the parties. which directly arises, if at all, from the primary fact, although the facts covered by this extended definition of the phrase may be attendant or explanatory circumstances involving no idea of action, or may be prior or subsequent to the happening of the primary fact, even by a considerable length of time, and although the facts may have happened at a different place from that at which the primary occurrence took place, or the acts may have been done by others than the principal participants."

22 C. J. 443-445.

It is not essential to the admissibility of a statement or act as a part of the res gestæ that it should have been made or done at the place where the principal fact occurred.

22 C. J. p. 458, sec. 456.Hodges vs. Hale, 161 S. W. 633.

In State vs. Sexton, 149 Missouri 89, 48 S. W. 452, it was held that:

"Declarations of several persons, made when they heard the firing of a revolver, which was the instrument of murder, are admissible as a part of the res gestæ, although they were in a house some distance from the place of murder."

See, also:

Anderson vs. Lush, 202 S. W. 304.

Louisville R. Co. vs. Buck, 19 N. E. 453; 2nd L. R. A. 520.

Leach vs. O. S. L. R. Co., 81 Pac. 90.

Trav. Ins. Co. vs. Mosley, 19 L. Ed. 437; Note 19 L. R. A. at p. 734.

10 R. C. L. p. 980.

Let us assume, however, for the sake of the argument that the evidence complained of was improperly admitted. Still there can be no doubt whatever that it was harmless error. The finding of death does not rest or cannot rest on the admission of this testimony. It would be absurd to contend otherwise. There is a wealth of evidence in the record, unobjected to, upon which that finding is bottomed. On this proposition we quote from 4 C. J. 999-1002, where it is said:

"As a general rule * * * in any case tried by the court without a jury the admission of incompetent evidence is not ordinarily ground for reversal, since it will be presumed, if nothing appears to the contrary, that the judge disregarded such evidence and tried the case on proper testimony Thus error in the admission of evidence is not a ground for reversal, if there is sufficient legal evidence to support the judgment or finding, * or the case decided on the issue raised without any reference to the evidence improperly admitted. * It is only where the competent evidence fails to support the findings of fact made by the trial court, or where it appears that the court was influenced by the improper evidence, or that appellant was harmed by the error, that the judgment will be reversed."

See, also:

McCaskill Co. vs. U. S., 54 L. Ed. 590.

Mammoth Mining Co. vs. Salt Lake F. Co., 38 L. Ed. 229.

Hinckley vs. Pittsburg Bessemer Steel Co., 30 L. Ed. 967.

Migeon vs. Montana Central R. Co., 77 Fed. 249.

Miller vs. Heuston City S. R. Co., 55 Fed. 366.

Sperry vs. O'Neil, Adams Co., 185 Fed. 231. Scott vs. McPherson, 168 Cal. 783, 145 Pac. 529.

In Reid vs. Stapp, 52 Fed. 641, 3 C. C. A. 244, it is said:

"Where there is a special finding of facts sufficient to support the judgment, the admission of immaterial evidence not affecting such findings is harmless error."

In Hinckley vs. Pittsburg, Bessemer St. Co., supra, we read:

"The admission of improper evidence on a trial to the court without a jury is harmless, where there is sufficient proper evidence on which to base the decision."

In Lancaster vs. Collins, 115 U. S. 222, 29 L. Ed. 373, it is held that:

"No judgment should be reversed in a court of error when it is clear that the error could not have prejudiced and did not prejudice the rights of the party against whom the ruling was made."

In Hunner vs. Mulcahy, 45 Wash. 365, we read:

"The admission of objectionable evidence on a trial before the court is not reversible error where it would not have changed the result."

Also, in Mitchell vs. Lidgerwood, 50 Wash. 290, 97 Pac. 61, it is held:

"Errors in the admission of evidence in a case tried by the court without a jury, are without prejudice where there was sufficient competent evidence to sustain the findings."

As such is the universal rule, the subject need not be pursued further.

IV

In opening the discussion upon the proposition of whether or not the evidence is sufficient to justify the finding of death, a proposition with which this court, so we contend, is not concerned, counsel for plaintiffs in error complain that the trial court indulged in the *presumption* that Stewart committed suicide. The trial court did not indulge in any such presumption. Is was unnecessary. The error that counsel have fallen into is plainly manifest from their own statement of the proposition they attempt to maintain. They say:

"It will not, we think, be denied that when the death is admitted (italics ours) but the cause thereof is in doubt, whether accident or self-destruction or some other cause, the presumption is all against suicide." (Brief, p. 19.)

Well, we admit that when "the death is admitted but the cause thereof is in doubt" the presumption is against suicide. But what application has that rule to the admitted facts in the case at bar? Do

counsel mean to admit that Stewart is dead? If so this controversy ought to cease. The rule that counsel invoke was established to promote justice, not to defeat it. It is all proper enough to be applied in an action on an accident policy of insurance, which by its terms prevents recovery if the insured commits suicide, and the contention of the insurer is grounded on the proposition that death was due to the excepted cause. In the instant case the only question at issue was the question of death, it matters not, so far as the liability of the insurance companies is concerned, whether his death was accidental or suicide. It follows then that the authorities cited by counsel to support the proposition they contend for are without the slightest application to the case at bar, and need not be noticed by us. This was not a case where any presumptions were indulged in by the lower court. The evidence as to the death of the insured was as positive and direct as the circumstances permitted.

Rogers vs. Manhattan Life Ins. Co., 71 Pac. 348 (Cal.).

Fidelity Mut. L. Ins. Co. vs. Metler, 185 U. S. 308, 46 L. Ed. 922.

Western Grain & S. Co. vs. Pillsbury, 159. Pac. 423 (Cal.).

Ins. Co. vs. Moore, 34 Mich. 41.

Coe vs. National Council, etc., L. R. A. N. S. 1915 B 744.

Mutual Life Ins. Co. vs. Stevens, 71 Fed. 258.

In re Miller's Will, 124 N. Y. S. 825.

Insurance Co. vs. Rosch, 23 Ohio (Cir. Ct. R.) 491.

Lancaster vs. Ins. Co., 62 Mo. 121, 17 C. J. 1176.

However, if we correctly understand counsel, they are not contending that there is an absence of any evidence to justify the finding of death, but only that the evidence is insufficient. The argument they indulge in could more properly be addressed to a trial court and not to a court of appeal and They argue that Judge Cushman did not find "the fact of death established." With all due deference to learned counsel, we say that Judge Cushman did find that Stewart met his death on the night of March 17, 1921, and words cannot disguise that fact. It is unnecessary to state that Judge Cushman's opinion, setting forth the reasons for his decision, is not a special finding, within the meaning of the Revised Statute, sections 649, 700.

U. S. vs. Sioux City Stock Yards Co., 167 Fed. 126, 92 C. C. A. 578.

But even were the contrary true, that decision finds as a fact that the insured met his death at the time alleged in the complaint. To say that there is no evidence to sustain this finding is to take a position that finds no support in the record. In fact the evidence on this vital issue is overwhelming. It establishes the death of the insured by proof that closely approximates a moral certainty. We doubt that an analysis of the evidence upon which this finding rests will serve any useful purpose, as this court is, if we accept the decision in Schoenwald vs. Bishop, 244 Fed. 715, as the governing rule in this circuit, limited to the sole question of whether or not there is any evidence to support the findings which are challenged.

A mere casual reading of the testimony of William Pomeroy, Paul G. Shotswell, John Scanlon, H. L. Curtis, Elmer Schorer, and Stewart's farewell letters to his wife (Pltffs' Exs. 16 and 17), in connection with the admitted fact that the bank, which he had controlled, had closed its doors, that Stewart himself was hopelessly insolvent, that he had used thousands of dollars belonging to the Richter estate, of which he was administrator, together with other circumstances too numerous to mention, suffice to answer the pivotal question. The testimony

of all of these witnesses is uncontradicted and unimpeached. They all appeared in person before the trial court and that court was the final arbiter as to the weight and credibility that should be attached to their testimony. We are not put in the position of asking this court to disregard any of their statements, as are learned counsel for plaintiffs in error when they request this court to disregard the testimony of Walter Comber and John Reid as unworthy of belief.

(In our statement of the case we adverted to the testimony of these two witnesses, not knowing that counsel for plaintiffs in error would of their own motion request this court to disregard their testimony. When counsel wrote their brief they kindly furnished us from time to time with portions of the manuscript copy, and that part of the brief in which they request this court to disregard the testimony of Comber and Reid was not in our hands at the time our statement of the case was prepared, which is now in the hands of the printers.)

As a reason for asking this court to disregard the tesimony of Reid who was their own witness they say the trial court found that he was mistaken when he testified that six passengers got off the steamer Queen when it landed in Kalama on the night of March 17, 1921. Well, it was also for the trial judge to determine whether or not Elwood, Onorato and others who testified on behalf of the defense were telling the truth, or were mistaken in many of their statements. This function the trial court performed, and when that court came to the conclusion that Elwood and Onorato were mistaken in their statements as to seeing Stewart subsequent to March 17, 1921, it is just as binding on plaintiffs in error as is the finding of the trial court that Mr. Reid was mistaken when he testified that six passengers debarked from the steamer Queen on the night that Mr. Stewart is said to have met his death.

The record discloses a multitude of reasons that moved Mr. Stewart to end his life. It is unnecessary to argue that when his bank was closed by Mr. Hay, the state bank examiner, he found himself in a critical position. He was, according to the testimony of all witnesses who testified upon the subject, in a state of physical collapse. His good name and reputation were gone forever. According to his own statements, contained in plaintiffs' exhibits 16 and 17, he had wrongfully used the moneys of the Richter estate, and he faced prosecuetion on that score. He was without suffi-

cient fortitude to face the future. He was, as testified to by Louis M. Plamondon, president of the Woodland bank:

"a very sensitive man and a man whose chief characteristic was pride. He was very touchy and very proud of his own judgment. He was always right, in business matters particularly. From my observation I would say that he could meet trouble and disaster very easily. I found that out from previous experiences with him. I might further say that he was not resourceful in meeting trouble.

* * *" (178-179.)

Rather illuminating testimony.

It is perfectly plain from the record that Mr. Stewart prior to the failure of the bank had in mind the idea of suicide. After his conference with Mr. Hay in the latter's office in Olympia on March 6, 1921, where his resignation as cashier of the Kelso State Bank was demanded, he read the handwriting on the wall and felt, if he did not know, that financial ruin and all its attendant consequences was fast approaching. This is evidenced by the letter (Pltffs' Ex. 17) that he wrote to his wife after his return from Olympia, and which was found in his private box in the bank after his demise.

"He was," testified his wife, after his return from Olympia, "absolutely a physical wreck." (184.)

When Hay came down to Kelso on the night of March 16, 1921, to close the bank, Stewart had no knowledge of his coming. He was taken by surprise. Carothers, the president of the bank, realized that it was longer useless to keep up the fight to continue the bank's existence, and had without Stewart's knowledge requested Mr. Plamondon to get in touch with Mr. Hay and have him come down, close the bank, and take charge of its affairs. When Mr. Hay arrived in the city on the evening of March 16, 1921, and his presence became known to Mr. Stewart he must have realized the crash which he had dreaded and which he had fought so hard to ward off was at hand. As a last resort he and Mr. Hay went to Portland in a final desperate endeavor to raise funds to tide over the bank's affairs, but were unsuccessful. Hay then returned to close the bank and Stewart commenced preparations to wind up his earthly affairs. He went to the Oregon Hotel and wrote his wife a farewell communication (Pltffs' Ex. 16). He wanted if possible to keep it from becoming known that he had used the funds of the Richter estate, and he directed her, when the insurance money was collected, to reimburse that estate to the end that

he might "keep my record clean." After finishing this communication he wrote to his old friend and former business associate, Judge McKenney, and to Al Maurer and Mr. Crouch, as well, enclosing each a deed to an interest in a tract of land in payment of his obligations to these gentlemen. These deeds it will be remembered were signed by his wife, on the morning he left for Portland. After writing these communications he went to the Union depot at Portland, ostensibly to take a train, and what took place there has been described by Roberts, the porter, and need not be further detailed on these pages. After he left the Union depot we lose sight of him until he boards the train at the North Bank Station about the hour of 6 p. m., the same afternoon. While on that train he is accosted by his friend, Carl Hayes, of Kelso, who attempts to engage him in conversation, but is told that he (Stewart) wants to sleep and to please let him alone. We dare venture to say that sleep did not come to "knit the ravelled sleeve of care." He was torn by conflicting emotions. His natural instinct, his love for his family, bade him live. But disgrace, ignominy, shame and punishment he could not face. It is a lamentable fact that thousands of others have been placed in a like position.

When Mr. Stewart finally arrived at Goble he went to the telephone and called up his home. He inquired of Mr. Sardam, who answered the call "about the little boy Sam, and his wife." He did not dare trust himself to talk to her. His voice, says Sardam, "sounded like he was trying to control it: it was suppressed in some way." After the close of this conversation he went aboard the little ferry boat, Queen. He stood on the prow of that boat in plain sight of Chisholm, Shotswell and Pomeroy, who knew him well, until the boat was equidistant from each shore. The time had come, and the opportunity was at hand. With a quick movement, that was noted by the persons named, he left the prow of the boat, went through the little cabin where were seated or standing Scanlon, Curtis and Schorer, opened the door leading to the small platform on the rear of the boat, and was immediately swallowed up, so we contend, in the waters of that mighty river. The boat made no stops in crossing the river. There were none to make. When the boat landed at Kalama he was of course missing. He never left the boat at the last named place. On this phase of the case the evidence is direct, positive and uncontradicted. Yet learned counsel for the insurance companies ask this court, a court of appeal and error, to enter the field of conjecture

and speculation and conclude that in some mysterious, unknown, unaccountable way he escaped therefrom. We hardly believe that this tribunal will be impressed with such a contention. But, they say, the body was not found, and we reply by pointing to the undisputed testimony which discloses that scores of persons have been drowned in the Columbia River whose bodies were never recovered. We are not to be defeated because we could not produce the dead body. We were not under well established rules of evidence required to prove death by evidence that is clear, cogent and convincing. We proved it in the same way, governed by the same general rules, as we would prove any other issuable fact.

Lancaster vs. Ins. Co., 62 Mo. 121.Ins. Co. vs. Stevens, 71 Fed. 278.Davis vs. Briggs, 97 U. S. 628, 24 L. Ed. 1086.

But, argues counsel, the testimony discloses that Mr. Stewart was seen on the streets of Hanford and Pasadena, California, at a date subsequent to March 17, 1921. They addressed that same argument to the trial court, whose province it was to weigh the testimony and determine the credibility of the witnesses, and the argument failed. Not

daunted, they renew it here. Well, if it was the province of this court to weigh conflicting testimony we would have no hesitancy in asserting that this court would undoubtedly arrive at the same conclusion reached by the trial court. George Elwood, the witness who swore that he saw Mr. Stewart on the streets of Hanford, California, on or about March 23 or 24, 1921, either testified falsely or he was very much mistaken in the identity of the person that he said was Mr. Stewart. And what are our reasons for this assertion? First of all we say that it is preposterous to assume that Mr. Stewart, if engaged in an attempt to defraud these insurance companies, would within a few days after his disappearance be seen, undisguised and unconcerned, parading the principal street of Hanford, California, a city of some six thousand souls, when people from all over the state of Washington are constantly thronging that section of the state, and no man from the state of Washington was any better known than Frederick L. Stewart, he having been rather active in the political life of his state, serving several years in the state senate.

Next, let us take note that Mr. Elwood, according to his own statement, had seen Mr. Stewart but twice since 1906, a period of over fifteen years. He

admitted that he did not speak or talk to Mr. Stewart on the occasion referred to. He also admitted that when in Kalama, Washington, in May of 1921, and in the presence of several persons, in Taylor's barber shop, he said he was not sure that it was Stewart he saw in Hanford, California. (270.) Further, Mr. Elwood's testimony that he saw and recognized Stewart in Hanford, California, was thoroughly impeached by proof of his variant statements made to many persons. But the strongest proof that Mr. Elwood did not see Mr. Stewart in Hanford is given by two witnesses who testified on behalf of the insurance companies, Benjamin Vienna and Spiro Papalian. Vienna was shown the old photograph of Stewart and testified that he cut the hair of a customer whose hair was "practically the same as presented in the picture * * *." Mr. Papalian, the restaurant keeper out of whose restaurant Mr. Elwood says he saw Stewart emerge, upon being shown the photograph of Stewart that we have referred to, testified that a person closely resembling the person shown in the photograph ate a meal in his place on the 23rd or 24th of March, 1921. When cross-examined Mr. Papalian further testified that the person whose photograph he was attempting to identify had eaten in his restaurant prior to the 23rd or 24th of March, 1921, and when asked to state the time he said that he was in his restaurant all during the month of February, 1921, but that he went to Stockton, California, during the first week of March, 1921, and that the person whose photograph he was attempting to identify had eaten in his restaurant "before I left." Well, when it is recalled that there is no contention that Mr. Stewart was out of the state of Washington prior to March 17, 1921, and when it is further recalled that the testimony is undisputed that Mr. Stewart was in the office of the state bank examiner of Olympia, Washington, on March 6, 1921, and that he was in Kelso, from the time he returned from Olympia until he left for Portland, Oregon, in company with Mr. Hay on the morning of March 17, 1921, the significance of Mr. Papalian's testimony becomes at once apparent. It is therefore too plain for argument that even if Mr. Elwood did see someone on the streets of Hanford, California, on or about March 23rd or 24th, 1921, that he thought was Mr. Stewart, it was simply a case of mistaken identity.

Concerning Vienna's testimony little further need be said. It only remains to be added that Elwood himself admits that when he saw Stewart in 1920 he had ceased to wear his hair in the manner disclosed in the old photo, and was then wearing it in "pompadour style." (274.) This testimony, taken in connection with the testimony of Mr. Asbury, the barber, is conclusive that the hair of the person Mr. Vienna cut on the 23rd or 24th of March, 1921, was the hair of some person other than Mr. Stewart.

The testimony of Meyer, Hansen and Pooley, captain, mate and purser respectively of the Steamer Mazatlan that sailed from San Pedro, California, about April 3rd or 4th, 1921, deserves but little consideration. Their description of the person they had on board bears but slight resemblance to Mr. Stewart. Each of these witnesses, although they were in contact for a period of seventeen days with the individual they had on board, and who they say resembled to some extent at least the photograph of Mr. Stewart, all testified that they did not observe anything unusual about the mouth or teeth of this individual, while the uncontradicted testimony discloses that the most noticeable thing about Mr. Stewart was his upper teeth, which were unusually long, and with the exception of the three front ones were all gold crowned, and that his mouth was so formed that even in casual conversation all of his teeth came at once into view.

Dr. Barnard, Stewart's dentist, testified:

"Do you suppose, Doctor, from your knowledge of Fred Stewart's teeth and his mouth, and the peculiarities that you have destribed, that a person could be with him for seventeen days, sit at the same table and eat with him, drink with him, and play poker with him, around a small deal table, and not notice those teeth?

"A. Absolutely not." (318.)

The Steamer Mazatlan landed at Manzanilla, Mexico, on April 20, 1921. Yet the defense produced the witness Onorato, a temperamental young Italian, who testified that on April 26, 1921, about the hour of noon, while driving through the streets of Pasadena, California, he observed a person on one of the streets of that city who he thought was Mr. Stewart. Well, if it was Stewart who was on board the steamer Mazatlan, fleeing to Mexico to hide himself in the wilds of that country, why would he on leaving the boat at Manzanilla hot-foot it back to Pasadena, California, and arrive there just in time to be seen by Onorato at noon on April 26, 1921? Will learned counsel for the insurance company enlighten us on this point? The evidence leaves it very doubtful as to whether or not a person landing at Manzanilla, Mexico, on April 20, 1921, could reach Pasadena, California, by April 26, 1921.

We rather think that the witness Moores intended to so testify, but in his cross-examination he says:

"From Manzanilla to El Paso is between 1,500 and 1,600 miles. They are making this run now in four days easily." (309.)

On his direct examination he had testified that a person leaving Manzanilla, Mexico, on April 20, 1921, could reach Los Angeles in four days, sixteen hours. The two statements are in direct conflict. If it takes four days to make the trip from Manzanilla, Mexico, to El Paso, Texas, then we are at a loss to know how the journey from El Paso, Texas, to Los Angeles, California, could by using the ordinary methods of travel, be completed in sixteen hours. However, we confidently submit that a reading of the testimony of Mr. Onorato leaves it exceedingly doubtful as to whether he was in Pasadena, California, on April 26, 1921. But no useful purpose will be subserved by entering into an analysis of the testimony of this witness. When Mr. Onorato returned to Kelso in May of 1921, just a few days after he says he saw Mr. Stewart on the streets of Pasadena, he told Mr. Robb, a resident of that city, and he so admits, that he would not swear that the person he saw on the streets of Pasadena was in fact Stewart. He also admits that he refused to make an affidavit at the request of Judge McKenney, administrator of Stewart's estate, that it was Stewart he observed at that time. However, like Mr. Elwood, he changed his mind when Mr. Wilton, the agent of the insurance companies, interviewed him.

Counsel for plaintiffs in error having requested this court to disregard the testimony of Comber, who testified that he saw Stewart on the streets of Pasadena, California, in August, 1921, and having admitted that Judge Cushman's finding that the witness Reid, when he testified that six passengers left the boat Queen when it landed at Kalama, Washington, on the night of March 17, 1921, was mistaken, makes unnecessary any attempted analysis of their inherently improbable statements.

Counsel find themselves taking inconsistent and vacillating positions. They contend that Stewart was the person that left the Steamer Mazatlan at Manzanilla, Mexico, on April 20, 1921; they then contend that it was Stewart whom Onorato saw in Pasadena on April 26, 1921; that it was Stewart who ate a meal in Papalian's restaurant in Hanford, California, on March 23rd or 24th, 1921, when Papalian, their own witness, affirms that the same person who partook of a meal in his res-

taurant on the date mentioned and who he said resembled the photograph shown him (Deft's Ex. "C," duplicate of Ex. "T") took two or three meals in his restaurant *prior* to the first Saturday in March of 1921.

It is useless to pursue the subject further. We submit that the findings excepted to are supported by a wealth of testimony, and that no reversible error was committed in the admission or rejection of evidence, and that the judgment should stand affirmed.

Respectfully submitted,

H. G. FITCH,
ELMER M. HAYDEN,
MAURICE A. LANGHORNE,
FREDERIC D. METZGER,
Attorneys for Defendant in Error.



United States Circuit Court of Appeals

For the Ninth Circuit

No. 3918

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, A CORPORATION, AND MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, A CORPORATION, PLAINTIFFS IN ERROR,

VS.

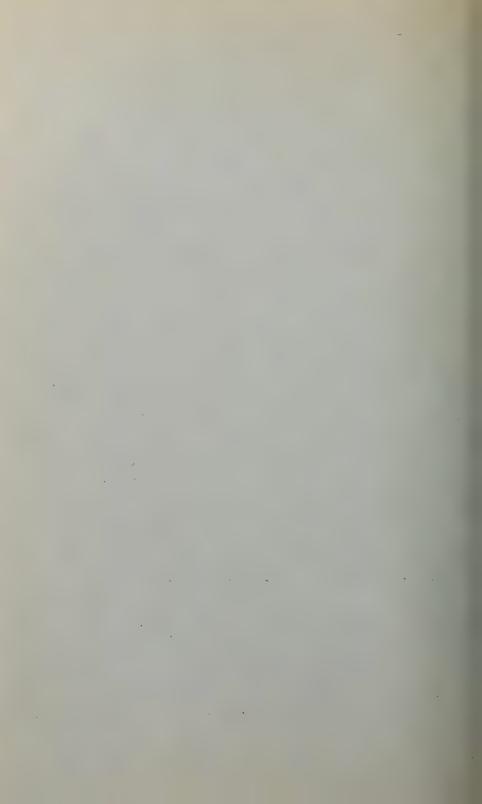
MAUDE E. STEWART, DEFENDANT IN ERROR.

PETITION FOR REHEARING

FEB 3 - 10

F. D. MONOKY

S. A. KEENAN,
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United States Circuit Court of Appeals

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PETITION FOR REHEARING

Now come the Plaintiffs in Error and most respectfully petition the court for a rehearing in this case. This petition is based chiefly upon the point that this court, according to the wording of its written opinion, did not consider what Planitiffs in Error deemed their main and controlling question on the appeal, viz: Is the presumption of suicide justified by the record?

In this court's opinion, it is finally stated: "we conclude that the weight of the evidence supports the inference that Stewart drowned in the Columbia River." If it had been left to the lower court to decide that Stewart met his death accidently or by suicide, the conclusion by this court, as above quoted. would be conclusive, but the lower court was limited by the pleadings and stipulation from finding that Stewart met his death in any other way than sui-It was so apparent from the circumstances surrounding Stewart's disappearance or death, that he could not have accidently met his death, coming across on the boat,—that counsel for the widow at the very threshold of the trial stipulated that Stewart deliberately killed himself by jumping from the ferry boat into the Columbia River.

Therefore, the only issue in both courts is: Did Stewart drown himself?

The trial court fully appreciated this, and frankly states that to decide the case he must say that Stewart disappeared or that he drowned himself. In the trial court's oral opinion, he states: "In this case the court is asked to choose between the theory that he destroyed himself physically by his own act and the theory that he banished himself from his friends and relatives forever and became

a wanderer and a tramp on the face of the earth, constantly on the alert, scanning every face for some look of recognition. You say he was a longheaded man. If he was, he must have known that was the fate that awaited him if he fled."

There is no positive evidence of the manner in which he left that boat.

It must be conceded, from the record, that there were at least two ways by which it was possible for him to have left the boat,—by the use of the life preservers or by getting off the boat unobserved on its landing.

The trial court in his decision states, that he presumed that Stewart committed suicide. The court so presumed or inferred in the face of the situation that Stewart had a possible means of escaping alive, and that he had every incentive imaginable to escape and go into hiding. And the further fact that many witnesses testified to having seen him alive afterwards.

To so infer or presume is in direct conflict with the presumption against suicide, as recognized by all the Federal Courts (authorities cited in brief for plaintiffs in error), as the courts have universally held "the fact (suicide) will never be inferred unless the evidence is such as to fairly exclude every other reasonable hypothesis as to the cause of death." In this case, where the beneficiary is depending upon actual suicide, the same principle must prevail, and with like force and effect the rule must read "the fact (suicide) will never be inferred unless the evidence is such as to fairly exclude every reasonable hypothesis as to his escape." The rule as heretofore almost universally used, applied to the cause of death, where the death was actually established or admitted. Various reasons have been assigned for the adoption of this rule. In Travellers' Ins. Co. v. McConkey, 227 U. S. 661, the court observed as a reason for the rule: "It is manifest that self-destruction cannot be presumed. So strong is the instinctive love of live in the human breast and so uniform the efforts of men to preserve their existence, that suicide cannot be presumed."

The same principle was applicable to Stewart on March 17, 1921. Life was not only sweet and dear to him but he had every reason to escape and go beyond the reach of the hands and the eyes of all the people he had defrauded. And, therefore, it would seem if this opinion stands, that the rule against presumption of suicide is overruled and entirely disregarded by this court.

In Connecticut Mutual Life Ins. Co. v. McWhirter, 73 Fed. 444; 19 C. C. A. 519 (Ninth Circuit) this court directly approved an instruction of the court wherein the jury was charged, "the presumption is that McWhirter did not kill himself." McWhirter was either murdered or he committed suicide. Either conclusion might be drawn from the evidence. In that case, the court also remarked that talk by deceased about committing suicide did not justify the presumption of suicide.

However, it would seem that this particular question escaped the attention of this court in deciding the case. The court evidently, at the time, was under the impression that it was only necessary to find that Stewart was dead, accidently or by suicide. For, in the opinion of this court, page seven, it is observed: "The inference drawn by the District Court that Stewart was drowned becomes entirely reasonable." In other words, by oversight, or intentionally, this court, in its opinion, makes no reference, except at the commencement, to Stewart's suicide. Anyone reading the opinion, from the facts related therein, will unhesitatingly say that the only issue in the case was "did Stewart meet his death coming over on the boat accidently or by suicide?" If we are correct in this statement, then, the real issue on this appeal, has not been determined by this court. For, the issue is limited to whether or not Stewart committed suicide. Under the evidence in the record, and under the well established rule of all the Federal courts, it would seem the inference of suicide is not justified. We most respectfully ask to have this, the real question on the appeal, decided.

PROOF OF DEATH

Where an insurance company receives proof of death, within due time, retains the proof and denies all liability, it will be presumed the company waived any further or other proof. Such, in substance, is the rule found in the cases cited in the court's opinion, but that rule is not applicable here. In this case, the companies at all times admitted their liability if Stewart is dead. *Death* is the only issue. By the terms of the contracts, the policies are not due until "due proof of death" is established. No objection was ever made to the "form" of the proof. *Prior* to the trial there was nothing offered that could be considered proof of death.

In the opinion, the court refers to affidavits being supplied. Shotswell made an affidavit, the substance of which is that Stewart got on the boat at Goble, was seen there when the boat got within a short distance of the Washington shore, that Stewart did not get off the boat on its landing at Kalama. From the affidavit it appears that the pilot on the boat observed Stewart, that five other passengers were on the boat and observed Stewart. Not a word by affidavit or otherwise was supplied to the companies from any other person on the boat. Accompanying this affidavit was a letter from the beneficiary's counsel stating "the facts are—and they can be amply proven—that Mr. Stewart faced criminal prosecution from a dozen different sources had he returned to Kelso, Washington. . . ." Another affidavit was made by the beneficiary in which she merely reiterates, from hearsay, the things set out in Shotswell's affidavit. In the face of that showing, emphasizing the fact that Stewart was a fugitive from justice, it was more probable that he escaped than that he killed himself. In these circumstances, it should not be held by the court that the companies should have conclusively presumed from this meagre statement that Stewart was dead and upon that statement pay over to the beneficiary \$86,000. On the contrary, it should be held that the companies were justified in requiring the beneficiary to establish the death of Stewart, and until that was established, there was no liability, under the terms of the policy.

It would appear from the opinion of the court that the companies' admission of liability, in the event of Stewart's death, was not taken into consideration by the court.

However, if the court concludes not to recede from the holding that the preliminary proofs were sufficient for the purpose of bringing these actions, vet, it should not be held that these policies were due until proof of death was established. Surely it cannot be held that that period was reached prior to the production of the testimony in court. The trial court frankly stated, upon consideration of all the evidence, that it could only presume death occurred on that night, and now in the written opinion of this court it is again frankly admitted "there may be a possibility that the man is alive ." Hence, it would seem that every consideration points to the conclusion that these insurance contracts were not due prior to the production of the proof in court. If that be so, then, no interest can be allowed on the contracts prior to

that date. We believe it is clearly within the power and within the discretion of this court to hold that interest shall not accrue on these contracts until after the filing of the opinion and judgment of this court.

Such, in substance, was the decision of the court in Rodgers v. Manhattan Life Ins. Co. (Cal.) 71 Pac. 348: "If the insurance company had admitted the death of the insured, but contended upon some other ground that it was exonerated from liability, the admission of the death might be held to be a waiver of proof of the fact; but upon the face of the policy no cause of action accrued until proofs of the death were made, or the fact of the death was admitted. The court below did not err in holding that interest did not accrue prior to the presentation of proofs of the death required by the policy." Therefore, the judgment of this court ought to fix the date from which interest shall begin, in the event the lower court is affirmed. This point was advanced in the oral argument.

We, therefore, most respectfully petition this court for a rehearing in this case.

Dated at Seattle, Washington, January 30, 1923.

S. A. KEENAN,
CHADWICK, MCMICKEN,
RAMSEY & RUPP,
Attorneys for Plaintiff in Error.

We, the undersigned, of counsel for plaintiff in error, as such, do hereby certify that in our judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

Dated at Seattle, Washington, January 30, 1923.

A. S. KEENAN,
OTTO B. RUPP,
Of Counsel for Plaintiffs in Error.

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN THREE VOLUMES.)

R. P. BUTCHART and CLARK M. MOORE,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

VOLUME I.
(Pages 1 to 320, Inclusive.)

Upon Writ of Error to the United States District Court of the District of Oregon.





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Names and Addresses of Attorneys of Record.

TEAL, MINOR & WINFREE and A. B. WIN-FREE, Spalding Building, Portland, Oregon, For the Plaintiffs in Error.

LESTER W. HUMPHRIES, United States Attorney, Old Post Office Building, Portland, Oregon,

For the Defendant in Error.

Citation on Writ of Error.

United States of America, District of Oregon,—ss.

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein R. P. Butchart is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 19th day of August, in the year of our Lord, one thousand nine hundred and twenty-one.

R. S. BEAN,

Judge.

Service accepted Aug. 19, 1921.

LESTER W. HUMPHREYS,

U. S. Atty. for Oregon.

[Endorsed]: No. C-7308. United States District Court, District of Oregon. R. P. Butchart vs. The United States of America. Citation on Writ of Error. U. S. District Court, District of Oregon. Filed August 19, 1921. G. H. Marsh, Clerk. [1*]

Citation on Writ of Error.

United States of America, District of Oregon,—ss.

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Clark M. Moore is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 19th day of August, in the year of our Lord, one thousand nine hundred and twenty-one.

R. S. BEAN,

Judge.

^{*}Page-number appearing at foot of page of original certified Transcript of Record.

Service accepted 19th August, 1921.

LESTER W. HUMPHREYS,

U. S. Atty. for Oregon.

[Endorsed]: No. C-7308. United States District Court, District of Oregon. Clark M. Moore vs. The United States of America. Citation on Writ of Error. U. S. District Court, District of Oregon. Filed August 19, 1921. G. H. Marsh, Clerk. [2]

In the United States Circuit Court of Appeals for the Ninth Circuit.

R. P. BUTCHART,

Plaintiff in Error.

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to the Judge of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between The United States of America, plaintiff and defendant in error, and R. P. Butchart, defendant and plaintiff in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by complaint doth

appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable WILLIAM HOW-ARD TAFT, Chief Justice of the Supreme Court of the United States this 19th day of August, 1921.

[Seal] G. H. MARSH,

Clerk of the District Court of the United States for the District of Oregon.

By F. L. Buck, Chief Deputy.

Service of the above writ of error made this 19th day of August, 1921, upon the District Court of the United States for the District of Oregon, by filing with me as Clerk of said Court a duly

certified copy of said writ of error.

G. H. MARSH,

Clerk, United States District Court, District of Oregon.

By F. L. Buck, Chief Deputy.

[Endorsed]: No. C—7308. In the U. S. Circuit Court of Appeals for the Ninth Circuit. R. P. Butchart, Plaintiff in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed August 19th, 1921. G. H. Marsh, Clerk, United States District Court, District of Oregon. By F. L. Buck, Deputy Clerk. [3]

In the United States Circuit Court of Appeals for the Ninth Circuit

CLARK M. MOORE,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to the Judge of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between The United States

of America, plaintiff and defendant in error, and Clark M. Moore, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear, and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS, the Honorable WILLIAM HOW-ARD TAFT, Chief Justice of the Supreme Court of the United States this 19th day of August, 1921.

[Seal] G. H. MARSH,

Clerk of the District Court of the United States for the District of Oregon.

By F. L. Buck, Chief Deputy.

Service of the above writ of error made this 19th day of August, 1921, upon the District Court of the

United States for the District of Oregon, by filing with me as Clerk of said Court, a duly certified copy of said Writ of Error.

G. H. MARSH,

Clerk, United States District Court, District of Oregon.

By F. L. Buck, Chief Deputy.

[Endorsed]: No. C-7308. In the U. S. Circuit Court of Appeals, for the Ninth Circuit. Clark M. Moore, Plaintiff in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed August 19th, 1921. G. H. Marsh, Clerk, United States District Court, District of Oregon. By F. L. Buck, Deputy Clerk. [4]

In the District Court of the United States for the District of Oregon.

July Term, 1916.

BE IT REMEMBERED, That on the 27th day of October, 1916, there was duly filed in the District Court of the United States for the District of Oregon, an indictment, in words and figures, as follows, to wit: [5]

In the District Court of the United States for the District of Oregon.

THE UNITED STATES OF AMERICA

VS.

S. H. COWELL, W. H. GEORGE, F. G. DRUM, R. B. HENDERSON, FRANK W. ERLIN, WILLIAM G. HENSHAW, TYLER HENSHAW, GEORGE T. CAMERON, FRED H. MUHS, JOHN C. EDEN, A. A. SUTHER-LAND, A. F. COATS, ALEXANDER BAILLIE, W. P. CAMERON, R. P. BUTCHART and CLARK M. MOORE,

Defendants.

Indictment for Violation of Sections One and Two of the Act of Congress Approved July 2, 1890 (Anti-trust Law).

United States of America, District of Oregon,—ss.

The grand jurors of the United States of America for the District of Oregon, duly impaneled, sworn, and charged to inquire within and for said district, upon their oaths and affirmations do find, charge, allege, and present:

COUNT ONE.

That during the ten years last past Portland cement has been manufactured at divers places in the state of California and west of the Cascade Mountain range in the states of Washington and Oregon, and put upon the market in large quantities in those localities; that such cement has been

and is a useful and necessary article of merchandise greatly in demand for the construction, among other things, of buildings, wharves, docks, bridges, pipe-lines, sewers, retaining walls, dams and pavements; that during said ten years divers concerns, in the manner and under the circumstances in this indictment hereafter set forth, have engaged in such manufacture and in such sale of such cement directly and indirectly to consumers; that a list of the names of such [6] of said concerns as are known to said grand jurors, showing their respective places of manufacture, so far as known to said grand jurors, is as follows, to wit:

Cowell Portland Cement Company, Cowell, California;

Pacific Portland Cement Company, Consolidated, Cement, California;

Standard Portland Cement Corporation, Napa Junction, California;

Santa Cruz Portland Cement Company, Davenport, California;

(hereinafter in this indictment referred to as the Northern California companies):

Riverside Portland Cement Company, Riverside, California;

(hereafter in this indictment referred to as the Southern California company);

Olympic Portland Cement Company, Bellingham, Washington;

Superior Portland Cement Company, Concrete, Washington;

Washington Portland Cement Company, Concrete, Washington;

(hereafter in this indictment referred to as the Washington company):

Oregon; Oregon; Oswego,

(hereafter in this indictment referred to as the Oregon company); that practically all of such cement consumed in said localities during the time aforesaid has been manufactured by said concerns; that said concerns, during said ten years, except as hereinafter shown, have respectively sold large portions of the cement so manufactured by them to consumers of, and dealers in, such cement, whose several places of consumption and business have been situated in others of said states than the one wherein said cement was so manufactured by said concerns respectively, and consigned other large portions thereof to such dealers and to their own agents in such other states for sale there by such dealers and agents; that in pursuance of such sales and upon such consignments [7] said concerns respectively have been continually shipping said cement to such consumers, dealers, and agents in such other states—the number of such consumers, dealers, and agents being so great, as said grand jurors, upon their said oaths, charge the fact to be, that it is impracticable if not impossible to set forth the names thereof in this indictment; that in and by so manufacturing, selling, consigning and shipping such cement into other states than the state of the manufacture thereof, each of

said concerns, throughout said ten years, has been engaged in trade and commerce among the several states of the United States within the meaning of the act of Congress approved July 2, 1890, and entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that each of said concerns, since the first day of August, 1914, has had one or more persons for its principal officer and agent, or officers and agents, hereinafter referred to together as defendants, who have been actively engaged, at said places of manufacture, in the management, direction, and control of the business and affairs of the concerns with which they were so severally connected; and that a list of the names of such of said persons as are known to said grand jurors, showing, so far as known to said grand jurors, the character of their several offices and agencies (Christian names unknown to said grand jurors being indicated by initials), is as follows, that is to say:

S. H. Cowell, President of the aforesaid Cowell Portland Cement Company;

W. H. George, Secretary of the aforesaid Cowell Portland Cement Company;

F. G. Drum, President of the aforesaid, Pacific Portland Cement Company, Consolidated;

R. B. Henderson, Treasurer and General Manager of the aforesaid Pacific Portland Cement Company, Consolidated;

- Frank W. Erlin, Secretary and Sales Manager of the [8] aforesaid Pacific Portland Cement Company, Consolidated;
- William G. Henshaw, President of the aforesaid Riverside Portland Cement Company;
- Tyler Henshaw, Vice-President and General Manager of the aforesaid Riverside Portland Cement Company;
- George T. Cameron, President of the aforesaid Santa Cruz Portland Cement Company, and Standard Portland Cement Corporation;
- Fred H. Muhs, Manager of the aforesaid Santa Cruz Portland Cement Company, and Standard Portland Cement Corporation;
- John C. Eden, President of the aforesaid Superior Portland Cement Company;
- A. A. Sutherland, Treasurer and Sales Manager of the aforesaid Superior Portland Cement Company;
- A. F. Coats, President of the aforesaid Washington Portland Cement Company;
- Alexander Baillie, Resident Agent of the aforesaid Olympic Portland Cement Company;
- W. P. Cameron, General Manager and Sales Agent of the aforesaid Olympic Portland Cement Company;
- R. P. Butchart, President of the aforesaid Oregon Portland Cement Company;
- Clark M. Moore, General Sales Manager of the aforesaid Oregon Portland Cement Company;

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that continuously and

at all times during the period of time from said first day of August, 1914, to the day of the finding and presentation of this indictment, said defendants, each then well knowing all the premises in this indictment aforesaid, unlawfully and knowingly have engaged in a combination in undue, unreasonable, direct, and oppressive restraint of said interstate trade and commerce, which so as aforesaid has been carried on by said several concerns above named of which they the said defendants were officers and agents as above set forth; that is to say, a combination, now here described, in restraint of, and which throughout said period of time has in fact restrained, said trade and commerce in the manner now here set forth.

Said defendants, so being in the active management, direction, and control of the business and affairs of said concerns as aforesaid, in their said several capacities [9] as officers and agents of those concerns, throughout said last-mentioned period of time, unlawfully and knowingly have by concerted action carried on and conducted said business of said concerns without any competition as to the localities in said States of Washington, Oregon, and California in which they respectively sold said cement, except as to said portion of said state of Oregon west of said Cascade Mountain range to the extent hereinafter indicated, and without any competition as to the prices at which they would respectively sell such cement in said State of Oregon west of said Cascade Mountain range as

hereinafter specified, and unlawfully and knowingly have by concerted action prevented said Southern California company from selling or consigning for sale its cement either in Washington or Oregon; said northern California companies from selling or consigning for sale their cement in Washington; said Washington companies from selling or consigning for sale their cement either in Oregon or California; and said Oregon company from selling or consignment for sale its cement either in Washington or California; and unlawfully and knowingly have by concerted action prevented said northern California companies and said Oregon company from selling or consigning for sale their cement in Oregon otherwise than upon arbitrary and noncompetitive prices, fixed and agreed upon between them in advance of such sales and consignments for sale; and in consequence of said unlawful conduct on the part of said defendants, and because of the want of competition in the particulars aforesaid between said concerns, all consumers of such cement in said localities in said States of Oregon, Washington, and California have been deprived of the benefits of competition as to the particulars aforesaid between said concerns so manufacturing and furnishing the same as aforesaid, and have been [10] compelled to pay for such cement arbitrary prices, and prices greatly in excess of the prices at which they would have secured such cement if said defendants had not engaged in

said unlawful combination in restraint of such trade and commerce as aforesaid.

And so the grand jurors aforesaid, upon their oaths aforesaid, do say, that said S. H. Cowell, W. H. George, F. G. Drum, R. B. Henderson, Frank W. Erlin, William G. Henshaw, Tyler Henshaw, George T. Cameron, Fred H. Muhs, John C. Eden, A. A. Sutherland, A. F. Coats, Alexander Baillie, W. P. Cameron, R. P. Butchart, and Clark M. Moore, defendants as aforesaid, during the period of time from the first day of August, 1914, to the day of the finding and presentation of this indictment, in said district of Oregon, and within the jurisdiction of this court, in manner and form and by the means and methods aforesaid, unlawfully and knowingly have engaged in a combination in restraint of trade and commerce among the several states; against the peace and dignity of the United States, and contrary to the form of statute of the same in such case made and provided.

COUNT TWO.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that said S. H. Cowell, W. H. George, F. G. Drum, R. B. Henderson, Frank W. Erlin, William G. Henshaw, Tyler Henshaw, George T. Cameron, Fred H. Muhs, John C. Eden, A. A. Sutherland, A. F. Coats, Alexander Baillie, W. P. Cameron, R. P. Butchart, and Clark M. Moore, defendants, during the period of time from the first day of August, 1914, to the day of

the finding and presentation of this indictment, so then being officers and agents respectively of the several concerns mentioned in the first count of this indictment as being manufacturers of and dealers in Portland cement, and so then having the [11] active management, direction, and control of the business and affairs of said concerns as in said first count set forth, in and by engaging, during said period of time, in the unlawful combination in restraint of the trade and commerce of said concerns in said first count described, and in and by knowingly carrying on the business of said concerns in the manner in said first count specified, the allegations of which said first count concerning all the matters aforesaid being, by reference, incorporated into this count as fully as if they were here repeated, unlawfully have, in the District of Oregon, and within the jurisdiction of this court, monopolized said trade, and commerce, it being a part of the trade and commerce among the several states: against the peace and dignity of the United States, and contrary to the form of statue of the same in such case made and provided.

Dated at Portland, Oregon, this —— day of ——, 1916.

A True Bill.

DAN. J. MOORE,
Foreman, United States Grand Jury.
BARNETT H. GOLDSTEIN,
Assistant United States Attorney.

[Endorsed]: A True Bill. Dan J. Moore, Foreman, Grand Jury; Barnett H. Goldstein, Asst. U. S. Attorney. Filed October 27, 1916, in Open Court. G. H. Marsh, Clerk. [12]

AND AFTERWARDS, to wit, on the 2d day of February, 1917, there was duly filed in said Court a demurrer to R. P. Butchart and Clark M. Moore to indictment, in words and figures as follows, to wit: [13]

In the District Court of the United States for the District of Oregon.

THE UNITED STATES OF AMERICA vs.

S. H. COWELL, W. H. GEORGE, F. G. DRUM, R. B. HENDERSON, FRANK W. ERLIN, WILLIAM G. HENSHAW, GEORGE T. CAMERON, FRED H. MUHS, JOHN C. EDEN, A. A. SUTHERLAND, A. F. COATS, ALEXANDER BAILLIE, W. B. CAMERON, R. P. BUTCHART, CLARK M. MOORE,

Defendants.

Demurrer of Defendants R. P. Butchart and Clark M. Moore.

Now come the defendant R. P. Butchart and Clark M. Moore and demur to count one of the indictment herein and specify the following as their grounds of demurrer to said count one:

- 1. The matters and things set forth and charged in said count one do not constitute an offense under or against the laws or any law of the United States.
- 2. The averments of said count one are too general, vague, indefinite, and uncertain to inform the said defendants, or either of them, of the nature or cause of the accusations against them or either of them, or to apprise them, or either of them, with such reasonable certainty of the offense, or offenses, with which they, or either of them, are charged, or which they, or either of them, may expect to meet on the trial, as to enable them, or either of them, to make their defense.
- 3. The said count one does not contain a description of, or set forth, or show, any combination in restraint of trade and commerce.

And the said defendants demur to count two of said indictment and specify the following as their grounds of demurrer to said count two. [14]

- 1. The matters and things set forth and charged in said count two do not constitute an offense under or against the laws or any law of the United States.
- 2. The averments of said count two are too general, vague, indefinite, and uncertain to inform the said defendants, or either of them, of the nature and cause of the accusations against them or either of them, or to apprise them, or either of them, with such reasonable certainty of the offense, or offenses, with which they, or either of them, are charged, or which they, or either of them, may expect to meet on the trial, as to enable them or either of them to make their defense.

- 3. The said count two does not contain a description of or set forth or show any combination to monopolize the trade and commerce, or any part of the trade and commerce, among the several states of the United States.
- 4. The said count two does not state facts sufficient to charge or show that the said defendants, or either of them, have monopolized the trade and commerce, or any part of the trade and commerce, among the several states of the United States.

TEAL, MINOR & WINFRED,

Attorneys for Defendants R. P. Butchart and Clark M. Moore.

Service of the within demurrer and receipt of a copy is hereby admitted this —— day of February, 1917.

CLARENCE L. REAMES, Of Attorneys for Plaintiff.

Filed February 2, 1917. G. H. Marsh, Clerk. [15]

AND AFTERWARDS, to wit on Monday, the 30th day of April, 1917, the same being the 49th judicial day of the regular March term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [16]

In the District Court of the United States for the District of Oregon.

No. 7308.

UNITED STATES OF AMERICA

VS.

S. H. COWELL, W. H. GEORGE, F. G. DRUM, R. B. HENDERSON, FRANK W. ERLIN, WILLIAM G. HENSHAW, TYLER HENSHAW, GEORGE T. CAMERON, FRED H. MUHS, JOHN C. EDEN, A. A. SUTHERLAND, A. F. COATS, ALEXANDER BAILLIE, W. P. CAMERON, R. P. BURCHART, and CLARK M. MOORE,

Defendants.

Judgment.

Now at this time, this matter coming on to be heard, the plaintiff appearing by Clarence L. Reames, United States Attorney for the District of Oregon, the defendants S. H. Cowell, W. H. George, F. G. Drum, R. B. Henderson, Frank W. Erlin, William G. Henshaw, and Tyler Henshaw, appearing by their attorney Pillsbury, Madison and Sutro; and the defendants George T. Cameron and Fred H. Muhs appearing by their attorneys Morrison, Dunne and Brobeck, and it appearing to the Court from the statements made in open court by the said counsel that the defendant S. H. Cowell is the president of the Cowell Portland Cement Company; the defendant W. H. George is the secretary of the

Crowell Portland Cement Company; the defendant F. G. Drum is the president of the Pacific Portland Cement Company, Consolidated; the defendant R. B. Henderson is the treasurer and general manager of the Pacific Portland Cement Company, Consolidated; the defendant Frank W. Erlin is the secretary and sales manager of the Pacific Portland Cement Company, Consolidated; the defendants William G. Henshaw and Tyler Henshaw, respectively, are the president and vice-president of the Riverside Portland Cement Company; the defendants George T. Cameron and Fred Muhs respectively, [17] are the president and general manager of the Santa Cruz Portland Cement Company and the Standard Portland Cement Company.

The Government now moves the Court for an order permitting the defendant W. H. George to enter herein a plea of guilty for and on behalf of the Cowell Portland Cement Company; the defendant F. G. Drum to enter a plea of guilty for and on behalf of the Pacific Portland Cement Company, Consolidated; the defendant William G. Henshaw to enter a plea of guilty for and on behalf of the Riverside Portland Cement Company, and the defendant George T. Cameron to enter a plea of guilty for and on behalf of the Santa Cruz Portland Cement Company, and the Standard Portland Cement Corporation, and that upon the entry of said pleas, the indictment herein, so far as it pertains to the defendants W. H. Cowell, R. B. Henderson, Frank W. Erlin, Tyler Henshaw, and Fred H. Muhs, be dismissed:

And all of the said defendants through their said respective counsel, having at this time asked the Court in open court to comply with said request and make said order, and the Court now being fully advised in the premises and it appearing that this is a case in which the said defendants, as said respective officers, ought to be permitted by this Court to enter said pleas for and on behalf of said corporations,

IT IS CONSIDERED, ORDERED, AND AD-JUDGED by the Court that the said defendants W. H. George, F. G. Drum, William G. Henshaw, and George T. Cameron, be permitted by the Court and allowed to withdraw the demurrers heretofore interposed by them and to enter their pleas as aforesaid to the indictment returned and filed in this court on the 27th day of October, 1916; [18]

WHEREUPON, in open court, the said respective defendants W. H. George, F. G. Drum, William G. Henshaw, and George T. Cameron, by and through their respective counsel and for and on behalf of said respective corporations, hereby formally enter pleas of guilty to said indictment;

WHEREUPON IT IS ORDERED, CONSIDERED, and ADJUDGED by the Court that said pleas be accepted and entered of record; that the defendants W. H. George, F. G. Drum, William G. Henshaw, and George T. Cameron, for and on behalf of said respective corporations each pay a fine herein in the sum of \$2500 without costs; that the indictment herein as to the defendants S. H. Cowell, R. B. Henderson, Frank W. Erlin, Tyler Henshaw,

and Fred H. Muhs, be and the same hereby is dismissed.

Done in open court this 30th day of April, 1917. CHAS. E. WOLVERTON,

Judge.

Filed April 30, 1917. G. H. Marsh, Clerk. [19]

AND AFTERWARDS, to wit, on Monday, the 16th day of July, 1917, the same being the 12th judicial day of the regular July term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [20]

In the District Court of the United States for the District of Oregon.

No. 7308.

July 16, 1917.

Indictment: Sections 1 and 2, Act July 2, 1890.

THE UNITED STATES OF AMERICA

S. H. COWELL, W. H. GEORGE, F. G. DRUM, R. B. HENDERSON, FRANK W. ERLIN, WILLIAM G. HENSHAW, TYLER HENSHAW, GEORGE T. CAMERON, FRED H. MUHS, J. C. EDEN, A. A. SUTHER-LAND, A. F. COATS, ALEXANDER BAILLIE, W. P. CAMERON, R. P. BUTCHART, CLARK M. MOORE.

Order Overruling Demurrer.

This cause was submitted to the Court upon the demurrers of the several defendants on file herein upon written briefs. On consideration whereof, it is ORDERED that said demurrers be and the same are hereby overruled. [21]

AND AFTERWARDS, to wit, on the 16th day of July, 1917, there was duly filed in said court, an opinion on the demurrers to indictment, in words and figures as follows, to wit: [22]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA

VS.

S. H. COWELL, W. H. GEORGE, F. G. DRUM, R. B. HENDERSON, FRANK W. ERLIN, WILLIAM G. HENSHAW, TYLER HENSHAW, GEORGE T. CAMERON, FRED H. MUHS, JOHN C. EDEN, A. A. SUTHER-LAND, A. F. COATS, ALEXANDER BAILLIE, W. P. CAMERON, R. P. BUTCHART, and CLARK M, MOORE,

Defendants.

Opinion on Demurrers to Indictment.

CLARENCE L. REAMES, United States Attorney, BARNETT H. GOLDSTEIN, Assistant U. S. Attorney, FREDERICK BAUSMAN and VEAZIE, McCOURT & VEAZIE, for Eden, Sutherland, Coats, Baillie, and Cameron.

TEAL, MINOR & WINFREE, for Butchart and Moore.

WOLVERTON, District Judge:

The indictment herein charges that the defendants, during the period between August 1, 1914, and the finding of the indictment knowingly and unlawfully engaged in a combination in restraint of trade and commerce among the several states, and by a second count that during the same time they engaged in a monopoly in like restraint of trade.

The defendants are officers in some capacity, in control to a greater or less extent, of certain corporations and companies engaged in the manufacture of cement and in the traffic and sale of the products in states other than where manufactured as well as in their own states. The companies are classified as the Northern California Companies, the Southern California Company, the Washington Companies, and the Oregon Company.

A demurrer has been interposed to the indictment, by which three questions are presented, namely, that defendants are not advised of the time, place, or circumstances upon [23] which the Government relies for conviction; that the offense with which it is sought to charge the defendants is not so stated as to afford them, after conviction or acquittal, protection against a second indictment for the same offense; and that the Court is not able to determine from the indictment whether a combination existed, or any of the defendants engaged therein, or whether the restraint referred to was undue or junreasonable.

First, as it relates to the time charged as to when the offense was committed: The parties were engaged from August 1, 1914, until the finding of the indictment, and by nature the act was continuing in its operation. In a case under this statute, it is unnecessary to set out any overt act. Simply the combination or contract in any form in restraint of trade between the states or with foreign nations constitutes the offense, and it is only essential to charge the combination or contract. Nash vs. United States, 229 U. S. 373; United States vs. Rintelen, 233 Fed. 793.

The combination is not a thing of the instant the minds of the agreeing parties have come to a completed understanding, either express or implied. The purpose thereof is an essential element as well, and this may contemplate that its operation shall extend over a period of time. While the parties are engaged in the operation of the design, or in carrying the same into effect, they are transgressing the statute, they are still agreeing to the unlawful offense, and still cohering in the thing that the law condemns. Thus the offense becomes a continuing one, and it is only necessary to allege that the par-

ties were engaged in the unlawful combination or contract between specified dates. By such allegation, the offenders are apprised of the time of their transgression. United States vs. MacAndrews & Forbes Co., 149 Fed. 823. [24]

The next question involves the nature of the offense. This has been settled by the Supreme Court. The statute has been construed to be very broad, and not only this, but very comprehensive. It comprises, says the Court in Standard Oil Co. vs. United States, 221 U. S. 1, 59,

"All contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense." And, further, it evinces "the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint." And,

"It was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

There has since been no digression from this holding, and it is unnecessary to cite the succeeding authorities. Of course, I realize and recognize the authority of the United States vs. Cruickshank, et al., 92 U. S. 542. It is essential in a case like this to descend to particulars, and not to rely simply on the words of the statute in pleading. United States vs. Hess, 124 U. S. 483.

Turning to the indictment we find various corporations or companies, located in different states, manufacturing Portland cement for the general trade, and engaged in interstate commerce. The companies are represented by certain officers and managers, who promote and carry on their business, being the defendants under indictment. These persons have knowingly by concerted action, carried on the business of the several concerns named. without competition as to prices in the several states in which they are engaged in the manufacture of their cement, and by the same concerted action have [25] prevented the Southern California Company from selling or consigning for sale in either Washington or Oregon, and the Northern California Companies from selling or consigning for sale in Washington, the Washington companies from doing the same as it respects Oregon and California, and the Oregon companies as to Washington and California, and have prevented the Northern California and Oregon Companies from selling or consigning for sale in Oregon otherwise than upon arbitrary and noncompetitive prices, fixed and agreed upon in advance. And it is further stated that, by reason thereof, consumers have been compelled to pay for such cement arbitrary prices greatly in excess of prices at which they would have secured such cement if it were not for the combination.

This, to my mind, states quite clearly the scheme and purpose of the combination. It descends to particulars, and no one need be misled into preparing his defense for something other than as alleged against him. The court knows what the charge is without the liability of misconception or mistake, and the defendants need not fear that another prosecution can follow after trial upon this indictment.

Apply the standard of reason, which counsel insist that we shall, and then inquire further whether there is an undue restraint of trade or commerce. The indictment does allege that, by reason of these things, the defendants were engaged in undue and unreasonable restraint of trade. We may put this to one side as a conclusion. There is sufficient alleged, however, from which to deduce this very conclusion. The concert of action which implies a combination for marketing their cement in particular locations, and the direct agreement between them for fixing arbitrary and noncompetitive prices for the sale of cement in Oregon, is sufficient to stamp their demeanor as in restraint of interstate trade and commerce. [26] Such a combination is without the elements or indicia of a wholesome agreement, and cannot be so characterized. The following cases are illustrative:

Standard Sanitary Mfg. Co. vs. United States, 226 U. S. 20; Eastern States Lumber Assn. vs. United States, 234 U. S. 600.

The third objection is answered by the foregoing. The same reasoning applies to the objections to the second count.

The objection that no venue is laid is without merit.

Demurrer overruled.

Filed, July 16, 1917. G. H. Marsh, Clerk. [27]

AND AFTERWARDS, to wit, on Monday, the 10th day of December, 1917, the same being the 31st judicial day of the regular November term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [28]

In the District Court of the United States for the District of Oregon.

No. 7398.

UNITED STATES OF AMERICA

VS.

S. H. COWELL, W. H. GEORGE, F. G. DRUM, R. B. HENDERSON, FRANK W. ERLIN, WILLIAM G. HENSHAW, TYLER HENSHAW, GEORGE T. CAMERON, FRED H. MUHS, JOHN C. EDEN, A. A. SUTHER-LAND, A. F. COATS, ALEXANDER BAILLIE, W. P. CAMERON, R. P. BUTCHART, and CLARK M. MOORE,

Defendants.

Judgment.

Now at this time this matter coming on to be heard, the plaintiff appearing by Clarence L. Reames, United States Attorney for the district of Oregon, the defendants John C. Eden, A. A. Sutherland, A. F. Coats, Alexander Baillie, and W. P. Cameron appearing by their attorney John McCourt, and it appearing to the Court from the statements made in open court by the said counsel, that the defendant John C. Eden is the president of the Superior Portland Cement, that A. A. Sutherland is the treasurer and sales manager of the Superior Portland Cement Company, that A. F. Coats is the president of the Washington Portland Cement Company, that Alexander Baillie is the resident agent of the Olymbia Portland Cement Company, and that W. P. Cameron is the general manager and sales agent of the Olympic Portland Cement Company;

The government now moves the Court for an order permitting the defendant John C. Eden to enter a plea of guilty for and on behalf of the aforesaid Superior Portland Cement Company; the defendant A. F. Coats [29] to enter a plea of guilty for and on behalf of the aforesaid Washington Portland Cement Company, and the defendant W. P. Cameron to enter a plea of guilty for and on behalf of the aforesaid Olympic Portland Cement Company, and that upon the entry of said pleas the indictment herein so far as it pertains to

the defendants A. A. Sutherland and Alexander Baillie be dismissed;

And all of said defendants, through their said respective counsel having at this time asked the Court in open court to comply with the said request and to make said order, and the Court now being fully advised in the premises, and it appearing that this is a case in which the said defendants as said respective officers ought to be permitted by the Court to enter said pleas for and on behalf of said respective corporations;

IT IS ORDERED, CONSIDERED, and AD-JUDGED by the Court that the said defendants John C. Eden, A. F. Coats, and W. P. Cameron be permitted by the Court and allowed to enter their pleas as aforesaid, to the indictment returned and filed in this court on October 27th, 1916;

Whereupon, in open court, the said respective defendants John C. Eden, A. F. Coats, and W. P. Cameron, by and through their respective counsel and for and on behalf of said respective corporations, hereby and herein formally enter pleas of guilty to said indictment;

Whereupon, it is ORDERED, CONSIDERED, and ADJUDGED by the Court that said pleas be accepted and entered of record; that the said defendants John C. Eden, A. F. Coats, and W. P. Cameron, for and on behalf of said respective corporations each pay a fine of twenty-five hundred dollars (\$2500.00) without costs; that the indictment herein, as [30] to the defendants A. A.

Sutherland and Alexander Baillie be and the same hereby is dismissed.

Dated at Portland, Oregon, this 10th day of December, 1917.

CHAS. E. WOLVERTON,

Judge, United States District Court.

Filed December 10, 1917. G. H. Marsh, Clerk. [31]

AND AFTERWARDS, to wit, on Monday, the 10th day of December, 1917, the same being the 31st Judicial day of the regular November term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [32]

In the District Court of the United States for the District of Oregon.

No. 7308.

December 10, 1917. Indictment: Section 37 P. C.

UNITED STATES OF AMERICA

VS.

S. H. COWELL, R. P. BUTCHART, CLARK M. MOORE, et al.,

Defendants.

Order Fixing Time of Trial.

Now at this day comes the plaintiff by Mr. Clarence L. Reames, United States Attorney, and

the defendants R. P. Butchart and Clark M. Moore, by Mr. Wirt Minor, of counsel. Whereupon said defendants R. P. Butchart and Clark M. Moore for plea to said indictment each through his said attorney says he is not guilty. Whereupon upon motion of said plaintiff it is ORDERED that this cause be and the same is hereby set for trial as to said defendants R. P. Butchart and Clark M. Moore for Tuesday, March 5, 1918. [33]

AND AFTERWARDS, to wit, on the 23d day of December, 1920, there was duly filed in said Court, a verdict, in words and figures as follows, to wit: [34]

In the District Court of the United States for the District of Oregon.

THE UNITED STATES OF AMERICA

VS.

S. H. COWELL, W. H. GEORGE, F. G. DRUM, R. B. HENDERSON, FRANK W. ERLIN, WILLIAM G. HENSHAW, TYLER HENSHAW, GEORGE T. CAMERON, FRED H. MUHS, J. C. EDEN, A. A. SUTHER-LAND, A. F. COATS, ALEXANDER BAILLIE, W. P. CAMERON, R. P. BUTCHART, and CLARK M. MOORE.

Defendants.

Verdict.

We, the jury duly empaneled and sworn to try the above-entitled cause, find the defendant R. P. Butchart guilty as charged in count one of the indictment and guilty as charged in count two of the indictment; and we find the defendant Clark M. Moore guilty as charged in count one of the indictment and guilty as charged in count two of the indictment.

Dated at Portland, Oregon, this 22d day of December, 1920.

I. H. COPELAND,

Foreman.

We, the jury, hereby recommend leniency to the court.

I. H. COPELAND, Foreman.

Filed December 23, 1920. G. H. Marsh, Clerk. [35]

AND AFTERWARDS, to wit, on Tuesday, the 18th day of January, 1921, the same being the 66th judicial day of the regular November term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [36]

In the District Court of the United States for the District of Oregon.

No. 7308.

THE UNITED STATES OF AMERICA

VS.

S. H. COWELL, W. H. GEORGE, F. G. DRUM, R. B. HENDERSON, FRANK W. ERLIN, WILLIAM G. HENSHAW, TYLER HENSHAW, GEORGE T. CAMERON, FRED H. MUHS, J. C. EDEN, A. A. SUTHER-LAND, A. F. COATS, ALEXANDER BAILLIE, W. P. CAMERON, R. P. BUTCHART, and CLARK M. MOORE,

Defendants.

Order Allowing Time to File Motion for New Trial and to Submit Bill of Exceptions.

On this day, the defendants R. B. Butchart and Clark M. Moore, by their attorneys, make application to this Court for an order extending the time in which to prepare and submit a motion for a new trial and a bill of exceptions and for stay of judgment from the 22d day of January, 1921, to and including the first day of February, 1921, and upon good cause shown therefor, it is hereby CON-SIDERED, ORDERED, and ADJUDGED that the said defendants do have until and including the first day of February, 1921, in which to prepare and submit a motion for a new trial and a bill of exceptions in this cause, and that judgment be stayed in this cause until said date.

Dated this 18th day of January, 1921.

R. S. BEAN, District Judge.

Filed January 18, 1921. G. H. Marsh, Clerk. [37]

AND AFTERWARDS, to wit, on the 31st day of January, 1921, there was duly filed in said Court a motion of defendant R. P. Butchart for a new trial, in words and figures as follows, to wit: [38]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

R. P. BUTCHART and CLARK M. MOORE, Defendants.

Motion and Petition for New Trial.

To the Honorable Judges of the Above-entitled Court:

Comes now R. P. Butchart, one of the defendants in the above-entitled cause, and moves and petitions the above-entitled court to set aside the verdict in this cause rendered against him and to grant to him, the said defendant, a new trial upon the ground and for the reasons following, that is to say:

T.

That the Court erred in stating the law.

II.

That the verdict of the jury has no evidence to sustain it.

III.

That the great preponderance of the evidence is against the verdict of the jury.

IV.

That the verdict of the jury is due to passion, prejudice, or partisan feeling.

With this, his motion, the said defendant R. P. Butchart presents a brief in which the several errors complained of are particularly set forth and in which he undertakes to show that the verdict of the jury has no evidence to sustain it, and that the great preponderance of the evidence is against the verdict, and that the verdict is due to passion, prejudice, or partisan feeling; and also [39] presents herewith a transcript of the evidence excepting the exhibits, and an abstract of all exhibits; and prays that his said brief and the said evidence and abstract of exhibits be considered and weighed by your Honors in support and as a part of his said motion and petition.

Dated this 31st day of January, 1921.

TEAL, MINOR & WINFREE,

Attorneys for the Defendant, R. P. Butchart.

United States of America, State and District of Oregon,—ss.

I, Wirt Minor, do hereby certify that I am one of the attorneys for the defendant R. P. Butchart in the above-entitled cause, and that the foregoing motion and petition is in my judgment well founded in law.

WIRT MINOR.

Service of the within motion and petition and receipt of a copy is hereby admitted this 31st day of January, 1921.

For United States of America.

Filed January 31, 1921. G. H. Marsh, Clerk. [40]

AND AFTERWARDS, to wit, on the 31st day of January, 1921, there was duly filed in said court a motion of defendant Clark M. Moore for a new trial, in words and figures as follows, to wit:

[41]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

R. P. BUTCHART and CLARK M. MOORE,
Defendants.

Motion and Petition for New Trial.

To the Honorable Judges of the Above-entitled Court:
Comes now Clark M. Moore, one of the defendants
in the above-entitled cause, and moves and petitions
the above-entitled court to set aside the verdict in
this cause rendered against him and to grant to him,

the said defendant, a new trial upon the ground and for the reasons following, that is to say:

I.

That the Court erred in stating the law.

II.

That the verdict of the jury has no evidence to sustain it.

III.

That the great preponderance of the evidence is against the verdict of the jury.

IV.

That the verdict of the jury is due to passion, prejudice and partisan feeling.

With this, his motion, the said defendant Clark M. Moore, presents a brief in which the several errors complained of are particularly set forth and in which he undertakes to show that the verdict of the jury has no evidence to sustain it, and that the great preponderance of the evidence is against the verdict, and that the verdict is due to passion, [42] prejudice or partisan feeling; and also presents herewith a transcript of the evidence excepting the exhibits, and an abstract of all exhibits; and prays that his said brief and the said evidence and abstract of exhibits be considered and weighed by your Honors in support and as a part of his said motion and petition.

Dated this 31st day of January, 1921.

TEAL, MINOR & WINFREE,

Attorneys for the Defendant, Clark M. Moore.

United States of America, State and District of Oregon,—ss.

I, Wirt Minor, do hereby certify that I am of the attorneys for the defendant Clark M. Moore in the above-entitled cause, and that the foregoing motion and petition is in my judgment well founded in law.

WIRT MINOR,

Filed January 31, 1921. G. H. Marsh, Clerk. [43]

AND AFTERWARDS, to wit, on Monday, the 31st day of January, 1921, the same being the 77th judicial day of the regular November term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [44]

In the District Court of the United States for the District of Oregon.

No. C-7308.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

R. P. BUTCHART and CLARK M. MOORE,
Defendants.

Order Extending Time to March 1, 1921, to Prepare and File Bill of Exceptions.

Application being made at this time to extend

the time in which to prepare and submit a bill of exceptions in the above-entitled cause and a motion for a new trial being at this time filed in this cause on behalf of the defendant R. P. Butchart and a similar motion on behalf of the defendant Clark M. Moore, and the Court being satisfied that it is in the interest of justice that the time be extended as applied for, it is hereby CONSIDERED, ORDERED, and ADJUDGED that each of the defendants, R. P. Butchart and Clark M. Moore, have until the first day of March, 1921, in which to prepare and submit a bill of exceptions in this cause, and the time in which to prepare said bill of exceptions be and the same is hereby extended until said date.

Dated this 31st day of January, 1921.

R. S. BEAN, District Judge.

Filed January 31, 1921. G. H. Marsh, Clerk. [45]

AND AFTERWARDS, to wit, on the 12th day of February, 1921, there was duly filed in said Court, a stipulation for an order extending time to submit bill of exceptions, in words and figures as follows, to wit: [46]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

R. P. BUTCHART and CLARK M. MOORE,
Defendants.

Stipulation for Order Extending Time to Submit Bill of Exceptions.

It is hereby stipulated by and between the United States of America and R. P. Butchart and Clark M. Moore, parties defendant, that the said R. P. Butchart and Clark M. Moore have, and each of them have, to and including the 30th day of April, 1921, in which to prepare and submit a bill of exceptions in the above-entitled cause.

Dated this 21st day of February, 1921.

LESTER W. HUMPHREYS,

Attorney for the United States of America.

TEAL, MINOR & WINFREE,

Attorneys for the Defendants R. P. Butchart and Clark M. Moore.

Filed February 21, 1921. G. H. Marsh, Clerk. [47]

AND AFTERWARDS, to wit, on Monday, the 21st day of February, 1921, the same being the 95th judicial day of the regular November term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [48]

In the District Court of the United States for the District of Oregon.

No. 7308.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

R. P. BUTCHART and CLARK M. MOORE,

Defendants.

Order Extending Time to and Including April 30, 1921, to Prepare and File Bill of Exceptions.

The stipulation having been entered into between the United States of America and R. P. Butchart and Clark M. Moore, defendants in this cause, whereby said R. P. Butchart and Clark M. Moore shall have and that each of them shall have to and including the 30th day of April, 1921, in which to prepare and submit a bill of exceptions in this cause; it is therefore CONSIDERED, ORDERED, and ADJUDGED that the time in which to prepare and file a bill of exceptions in this cause be and the same hereby is extended to and including the 30th day of April, 1921.

Dated this 21st day of February, 1921.

R. S. BEAN,

Judge.

Filed February 21, 1921. G. H. Marsh, Clerk. [49]

AND AFTERWARDS, to wit, on Monday, the 21st day of February, 1921, the same being the 95th judicial day of the regular November term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [50]

In the District Court of the United States for the District of Oregon.

No. C—7308. February 21, 1921.

Indictment: Sections 1 and 2, Act July 2, 1890.

THE UNITED STATES OF AMERICA

vs.

S. H. COWELL, R. P. BUTCHART and CLARK M. MOORE.

Order Denying Motion for New Trial.

This cause was heard by the Court upon the motion of defendants R. P. Butchart and Clark M. Moore for a new trial and to set aside the verdict herein, plaintiff appearing by Mr. Lester W. Humphreys, United States Attorney, and Mr. Hall S. Lusk, Assistant United States Attorney, and

the defendants R. P. Butchart and Clark M. Moore by Mr. Wirt Minor and Mr. A. B. Winfree, of counsel. Upon consideration whereof, it is ordered that said motion be and the same is hereby denied. [51]

AND AFTERWARDS, to wit, on Wednesday, the 23d day of February, 1921, the same being the 97th judicial day of the regular November term of said Court — Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [52]

In the District Court of the United States for the District of Oregon.

No. 7308.

February 23, 1921.

Indictment: Act July 2, 1890.

THE UNITED STATES OF AMERICA

VS.

S. H. COWELL, R. P. BUTCHART and CLARK M. MOORE.

Sentence.

Now at this day come the plaintiff by Mr. Lester W. Humphreys, United States Attorney, and the defendants R. P. Butchart and Clark M. Moore by Mr. Wirt Minor, of counsel. Whereupon, upon motion of plaintiff for judgment upon the verdict and recommendation of the jury heretofore returned herein, it is adjudged that said defendant

R. P. Butchart do pay a fine of \$5,000.00, and that said defendant Clark M. Moore do pay a fine of \$2,500.00, and that each of said defendants be committed to the county jail of Multnomah county, Oregon, until his said fine be paid or until he be discharged according to law. Whereupon, upon motion of the defendants, it is ordered that execution herein be and the same is hereby stayed pending the issuance of a writ of error to review said judgment. [53]

AND AFTERWARDS, to wit, on the 3d day of May, 1921, there was duly filed in said court, a stipulation relative to bill of exceptions, in words and figures as follows, to wit: [54]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

S. H. COWELL, W. H. GEORGE, F. G. DRUM, R. B. HENDERSON, FRANK W. ERLIN, WILLIAM G. HENSHAW, TYLER HENSHAW, GEORGE T. CAMERON, FRED H. MUHS, JOHN C. EDEN, A. A. SUTHER-LAND, A. F. COATS, ALEXANDER BAILLIE, W. P. CAMERON, R. P. BUTCHART, and CLARK M. MOORE,

Defendants.

Stipulation Relative to Bill of Exceptions.

It is hereby stipulated by and between the United States of America, acting by Lester W. Humphreys, its attorney, and R. P. Butchart and Clark M. Moore, defendants in the above-entitled cause and the only defendants on trial in said cause, acting by Wirt Minor, one of their attorneys:

- 1. That all exhibits offered and received in evidence upon the trial of the above-entitled cause be attached to and made a part of the bill of exceptions.
- 2. That all papers, writings, and printed matters offered in evidence but not received in evidence in said cause, or so many thereof as said Lester W. Humphreys or Wirt Minor may in writing designate to the Clerk of the above-entitled court, shall be attached to and made a part of the bill of exceptions.
- 3. That there be attached to and made a part of the bill of exceptions in said cause the abstract of exhibits offered and received in evidence upon the trial of said cause which abstract is attached hereto, identified by the signatures of Lester W. Humphreys and Wirt Minor.
- 4. That the exhibits attached to the bill of exceptions and other writings, papers, and printed matters attached to the bill of exceptions be not printed as a part of the transcript of record upon the writ of error except such parts thereof as may be designated in writing by the [55] said Humphreys or the said Minor, but in lieu thereof the

said abstract be printed as a part of said transcript of record.

Dated this 29th day of April, 1921.

LESTER W. HUMPHREYS. WIRT MINOR.

Filed May 3, 1921. G. H. Marsh, Clerk. [56]

AND AFTERWARDS, to wit, on Tuesday, the 3d day of May, 1921, the same being the 50th judicial day of the regular March term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [57]

In the District Court of the United States for the District of Oregon.

No. 7308.

THE UNITED STATES OF AMERICA,
Plaintiff,

VS.

S. H. COWELL, W. H. GEORGE, F. G. DRUM, R. B. HENDERSON, FRANK W. ERLIN, WILLIAM G. HENSHAW, TYLER HENSHAW, GEORGE T. CAMERON, FRED H. MUHS, J. C. EDEN, A. A. SUTHERLAND, A. F. COATS, ALEXANDER BAILLIE, W. P. CAMERON, R. P. BUTCHART and CLARK M. MOORE,

Defendants.

Order on Stipulation Relative to Bill of Exceptions.

A stipulation having been entered into by and between the United States of America, acting by Lester W. Humphreys, its district attorney, and the defendants, R. P. Butchart and Clark M. Moore, acting through Wirt Minor, one of their attorneys; it is therefore and in pursuance of said stipulation ordered:

- 1. That all exhibits offered and received in evidence upon the trial of the above-entitled cause be attached to and made a part of the bill of exceptions.
- 2. That all papers, writings, and printed matter offered in evidence but not received in evidence in said cause, or so many thereof as the said Lester W. Humphreys or Wirt Minor may in writing designate to the Clerk of the above-entitled court shall be attached to and made a part of the bill of exceptions.
- 3. That there be attached to and made a part of the bill of exceptions of said cause the abstract of the exhibits offered and received in evidence upon the trial of said cause, which abstract is attached to the bill of exceptions as tendered and identified by the signatures of the said attorneys.
- 4. That the exhibits attached to the Bill of Exceptions and other writings, papers, and printed matters attached thereto be not printed as a part of the transcript of record upon the writ of error except in so far as and such parts thereof as may be designated in writing by the said attorneys [58] or either of them, and in lieu thereof the said ab-

stract be printed as a part of said transcript of record.

Dated this 3d day of May, 1921.

R. S. BEAN, District Judge.

Filed May 3, 1921. G. H. Marsh, Clerk. [59]

AND AFTERWARDS, to wit, on Tuesday, the 3d day of May, 1921, the same being the 50th judicial day of the regular March term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [60]

In the District Court of the United States for the District of Oregon.

No. 7308.

May 3, 1921.

Indictment: Act July 2, 1890.

THE UNITED STATES OF AMERICA vs.

S. H. COWELL et al.

Order Extending Time to File Proposed Amendments to Bill of Exceptions.

Now at this day, upon motion of Mr. Hall S. Lusk, Assistant United States attorney, it is ordered that he be and he is hereby allowed fifteen days from this date to file proposed amendments to the bill of exceptions herein. [61]

AND AFTERWARDS, to wit, on Monday, the 16th day of May, 1922, the same being the 61st judicial day of the regular March term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [62]

In the District Court of the United States for the District of Oregon.

No. C-7308.

May 16, 1921.

Indictment: Sections 1 and 2, Act of July 2, 1920.

THE UNITED STATES OF AMERICA

vs.

S. H. COWELL et al.

Order Extending Time to June 1, 1921, to File Proposed Amendments to Bill of Exceptions.

Now at this day upon motion of Mr. Lester W. Humphreys, United States attorney, it is ordered that said plaintiff be and he is hereby allowed to Wednesday, June 1, 1921, to propose amendments and enter objections to the bill of exceptions herein. [63]

AND AFTERWARDS, to wit, on Tuesday, the 31st day of May, 1921, the same being the 74th judicial day of the regular March term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [64]

In the District Court of the United States for the District of Oregon.

No. C-7308.

May 31, 1921.

Indictment: Sections 1 and 2, Act of July 2, 1920.
THE UNITED STATES OF AMERICA

VS.

S. H. COWELL, R. P. BUTCHART and CLARK M. MOORE.

Order Extending Time to June 15, 1921, to File Proposed Amendments to Bill of Exceptions.

Now at this day, upon motion of Mr. Lester W. Humphreys, United States attorney, it is ordered that defendants R. P. Butchart and Clark M. Moore be and they are hereby allowed to Wednesday, June 15, 1921, to propose amendments to their bill of exceptions herein. [65]

AND AFTERWARDS, to wit, on the 18th day of July, 1921, there was duly filed in said court a bill of exceptions, in words and figures as follows, to wit: [66]

In the District Court of the United States for the District of Oregon.

THE UNITED STATES OF AMERICA,
Plaintiff,

VS.

S. H. COWELL, W. H. GEORGE, F. G. DRUM, R. B. HENDERSON, FRANK W. ERLIN, WILLIAM G. HENSHAW, TYLER HENSHAW, GEORGE T. CAMERON, FRED H. MUHS, JOHN C. EDEN, A. A. SUTHERLAND, A. F. COATS, ALEXANDER BAILLIE, W. P. CAMERON, R. P. BUTCHART and CLARK M. MOORE,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED that on Friday, the 10th day of December, 1920, that certain cause came on to be heard in the District Court of the United States for the District of Oregon, wherein the United States of America is the plaintiff, and S. H. Cowell, W. H. George, F. G. Drum, R. B. Henderson, Frank W. Erlin, William G. Henshaw, Tyler Henshaw, George T. Cameron, Fred H. Muhs, John C. Eden, A. A. Sutherland, A. F. Coats, Alexander Baillie, W. P. Cameron, R. P. Butchart, and

Clark M. Moore are defendants, before the Honorable R. S. Bean, District Judge, presiding, upon the indictment found in the said court against the defendants by the grand jury of the United States for the District of Oregon, dated the 27th day of October, 1916, the United States appearing by Mr. Lester W. Humphreys, District Attorney, and Mr. Hall S. Lusk, the assistant District Attorney, and the defendants R. P. Butchart and Clark M. Moore by Mr. Wirt Minor and Mr. A. B. Winfree, attorneys, and thereupon the following proceedings were had. [67]

The attorneys for the several parties having declared themselves ready for trial, a jury of twelve men was called, examined regarding their qualifications as jurors, accepted by the several parties, impaneled and sworn, and thereupon opening statements were made to the jury by the attorneys representing the United States and the said defendants, and thereupon the United States offered in evidence the stipulation entered into by and between the said defendants and the United States, marked Exhibit 1, and read to the jury, and before the same was read the attorneys for the said defendants in open court objected to the introduction of any evidence in the cause upon the ground that the indictment does not state facts sufficient to charge a crime of any kind or any violation of the law. Thereupon the Court overruled the objection and an exception was taken and allowed to the said defendants, and thereupon the said defendants by their attorneys stated that they desired to object to the introduction of

any paper or writing offered in evidence, the date of which is prior to the date of the organization of the Oregon Portland Cement Company, and that for the convenience of the Court and of counsel it should be understood that such objection was made to each paper so dated, it being understood that the Oregon Portland Cement Company was not organized or in business until the —— day of August, 1915, and thereupon it was agreed that each paper or writing offered in evidence by the United States bearing date prior to the said date of the organization of the Oregon Portland Cement Company should deemed objected to, the objection overruled and the exception allowed to the said defendants, and thereupon the United States by its attorney offered in evidence the testimony of Tyler Henshaw taken upon the former trial of this cause in 1919, [68] and offered in evidence in pursuance of a stipulation entered into between the United States of America and the said defendants R. P. Butchart and Clark M. Moore, it being understood that every objection made to any evidence given by said witness upon the former trial to which objection was made at that time should be subject to the same objection, that the same ruling should be made thereon, and an exception allowed to the defendants where the ruling was adverse to the defendants and thereupon the testimony of said Henshaw was read to the jury and therein the said Henshaw testified as follows:

Testimony of Tyler Henshaw, for the Government.

"I live in Oakland, California, am engaged in the business of manufacturing cement. My company is the Riverside Portland Cement Company, of which I am vice-president and general manager. I have held this position since the organization of the company in 1905. Its plant is located at Riverside in southern California, about 57 miles east of Los Angeles. This company is the one designated in this market and in the indictment as the southern California Company. Its capitalization is two and one-half million dollars in stock and one million dollars in bonds. Its plant has a capacity of about 5500 barrels a day with twelve kilns. This company did ship cement into the state of Washington and into the State of Oregon. It stopped shipping into both states, into the state of Washington in about 1912 or 1913, into Oregon in the latter part of 1915, it withdrawing entirely from the Washington market in 1913 and from the Oregon market in 1915. I am familiar with the officers and managers of the various California cement companies and with the officers and managers of the Washington and Oregon cement companies. When in business in Oregon I had an agency in the city of Portland. In 1914 and 1915 and until [69] we withdrew, C. W. Jones represented us. Our office was in the Railway Exchange Building. I have known the defendant R. P. Butchart for six or seven years. I have known him principally as a cement manufacturer, controlling or having an interest in the

Vancouver Portland Cement Company, located at Tod Inlet, a Canadian concern. I did not know him as a stockholder in the Washington Portland Cement Company. I did know him as a stockholder and president of the Oregon Portland Cement Company,—I think possibly as early as 1915. I knew of his interest in the Oregon Portland Cement Company prior to our withdrawal from the state of Oregon. I never knew Clark M. Moore,-never saw him that I know of. When I withdrew from the Washington market I did so after a conference with Mr. John C. Eden, president of the Superior Portland Cement Company. No inducements were offered me to withdraw. Mr. Eden told me that their market had fallen off very badly, that there was not enough business in Washington for the two companies then manufacturing in western Washington and as we were enjoying a very large business in southern California asked me if I would be willing to withdraw from Washington. I told him that our business there was not so valuable that I cared for it, but that I was under obligations to F. T. Crowe & Company who were our agents in Seattle and Tacoma and had to protect them, and that if he would furnish them with cement so that they could continue in the market I would be willing to withdraw from the Washington market, otherwise I would have to stay in that market indefinitely. I did not discuss my intentions with any other California company or with any other Washington company. This was the only conversation that I re-

member having on this matter. The withdrawal of our company from the state of Oregon was a matter [70] which came up between the president of the Riverside company and myself. It was not discussed at any conference with other cement manufacturers and no other officers of the Riverside Portland Cement Company took part in the discussion. The president of the Riverside Company is Mr. W. G. Henshaw, my brother. He wished to withdraw from Oregon as the prices were so variable and the result of our work in Oregon so poor and the profits so small and the risks so great that the game was not worth the candle. The risks he referred to were bad accounts. Sometimes in a month our accounts might run to \$125,000 or \$150,-000 and we were bound to lose a percentage of these accounts. The risk of any invasion of southern California was not considered. The four or five northern California companies are invited to the southern California markets whenever they wish to come and always have been. We never had the same price in the Oregon market that I ever knew of. We cut prices continually in Oregon whenever we needed business; we had to. I have cut as low as \$1.55 a barrel. This was really selling at a loss. It was my brother who did not care for the Oregon market. The question between us was a question of policy. The situation in 1914 and 1915 is not very fresh in my memory."

Thereupon the witness identified a carbon copy of a letter written by the agent of the Riverside

Portland Cement Company to the witness from Portland, dated April 1, 1914, which letter was offered in evidence marked Exhibit 1, objected to by the defendants, the objection overruled and exception taken and was read to the jury, and the witness further testified:

"Mr. Statter was the representative in Portland at that time of the Pacific Portland Cement Company, a northern [71] California company."

Thereupon the witness identified the carbon copy of a letter dated April 7, 1914, written by C. W. Jones to the witness, and a letter written by the witness to said Jones from San Francisco dated April 11, 1914, and the said carbon copy and said letter were offered in evidence as one exhibit marked Exhibit 2, and over the objection and exception of the defendants on account of their date were read to the jury.

Thereupon the witness further testified: "I should say at the time those letters were written competition in the State of Washington was very active between the Washington mills and that competition in the State of Oregon as between the California mills was active. The situation in the Oregon market right straight through was that when any contract for any amount of cement of a thousand barrels or over came up there was never a market. The companies fought for it and that company got the order which put in the lowest bid. This was the situation in that market during the five years that I was in that market so that we

were unable to do anything but lose money in that market and yet we had the lowest cost I think on the average of any cement mill on the Coast. There was nothing to prevent us from withdrawing from that market at any time. There was always a scrap between the California companies in California. Sometimes I was in it and sometimes I was not."

Thereupon the witness identified carbon copy of a telegram from C. W. Jones to witness, dated April 19, 1914, and the same was marked Exhibit 3 and offered in evidence over the objection and exception of defendants on account of its date and read to the jury. [72]

Thereupon the witness identified carbon copy of a letter written by C. W. Jones to the witness dated April 20, 1914, and the same was marked Exhibit 4, offered and received in evidence and read to the jury over the objection and exception of the said defendants on account of the date.

The witness further testified: "I have no copy of the letter written by me to Jones dated April 20, 1914. The Government took about 480 of our letters. It had our files for a week or ten days to go over and I have no recollection of any letter of that date or of its contents."

Thereupon the witness identified a letter dated April 25, 1914, written by the witness to C. W. Jones, and the same is marked Exhibit 5, offered in evidence and received and read to the jury over

the objection and exception of the defendants made on account of its date.

The witness further testified: "From this letter it appears that conditions in the Oregon market were not stabilized, that the market had evidently gone to pieces."

Thereupon the witness identified a letter written by the witness to C. W. Jones, dated April 29, 1914, and the same is marked Exhibit 6, offered in evidence and received and read to the jury over the objection and exception of the defendants made on account of its date.

The witness further testified: "Statter was the agent of the Pacific Portland Cement Company. In this letter when I say 'overt act' I would say that my policy all through was to try to hold up the market and not do any cutting,—to maintain a stable price. It is always a temptation to a salesman or branch [73] manager to cut his price and get a contract and I didn't want to do that. I endeavored to avoid that policy as far as possible. All of these letters are along the same line. In the letter when I say 'we don't want to invite serious trouble down here' I do not mean in lower California. I did not worry or fear that the northern California mills would invade the Southern California field."

Thereupon the witness identified the letter written by the witness to C. W. Jones dated May 13, 1914, which letter was marked Exhibit 7, offered and

received in evidence over the objection of the defendant on account of its date, and read to the jury.

The witness further testified: "This letter does not indicate that there was any fear of the central California mills invading southern California. We did not control the southern California market, I cannot remember the details of things of this sort. The letter indicates that there was a threat on the part of the central California mills to make any sort of a fight to increase their business. At times they would have a very small market. They had built large mills when there were no other mills except theirs; the demand for the cement increased, they drove out foreign mills which were selling at the rate of about \$3.50 per barrel. I have paid myself as high as \$6.50 per barrel. Gradually other mills came in. The central California mills had built these large mills to supply the Coast trade and sold up to Montana and into Arizona. Then mills were built in Western Washington, later on in southern California. The central California mills could do nothing against these mills. They were cut out of Washington, then out of eastern Washington and Montana. [74] The result was that territory was small and it was hard going for them. They had large mills on their hands; they had to produce a good deal of cement to keep the price down to a reasonable figure, otherwise the overhead would go out of sight. I was not afraid of an invasion of southern California, but was afraid the central California mills would go wild

on all markets everywhere. I note the expression 'there is an attack threatened upon us of rather a serious nature by the central California mills.' This would happen from about every three to six months. I was not so much afraid of the threat but rather of the fact that they were apt to go into all the markets and break up everything. They may not have had that idea."

Thereupon the witness identified telegram and letter from C. W. Jones to witness dated May 21, 1914, and the same were marked Exhibit 8, and offered and received in evidence over the objection of the defendants on account of the date thereof and were read to the jury.

The witness further testified: "In connection with the telegram of May 21, 1914, in which I said 'do not care to take business away from any California mill,' as I explained before their territory had been shortened up, they claim it was hard for them to get a reasonable tonnage in Oregon particularly. I never attempted to get more than a moderate amount of business in Oregon. You may call it an act of charity if you choose. The companies mentioned in this telegram were all California companies. The telegram was sent by my agent Mr. Jones."

Thereupon witness identified the telegram from C. W. Jones to witness, dated May 27, 1914, marked Exhibit 9, and the same was offered and received in evidence over the [75] the objection of the

(Testimony of Tyler Henshaw.) defendants on account of its date and read to the jury.

The witness further testified: "From these telegrams it appears there was active competition at that time between the Washington mills and the California mills for business in Oregon. There was no agreement so far as I know between the California mills in regard to the market in Oregon. I didn't care to disturb conditions in Oregon and have given you my reasons therefor."

Thereupon the witness identified telegram dated May 28, 1914, from C. W. Jones to witness, marked Exhibit 10, and the same was offered and received in evidence over the objection of the defendants on account of its date and read to the jury.

The witness further testified: "Previous correspondence shows that the fight was largely between Washington mills and California mills at that time. Things changed later. They were forever shifting."

Thereupon witness identified a letter dated June 1, 1914, from the witness to Jones and the same was marked Exhibit 11, and was offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury, and also in connection therewith a telegram from said Jones to the witness dated June 1, 1914, marked Exhibit 12, was also offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury; and also a letter from the witness to said Jones dated June 11, 1914, marked Exhibit 13, which

was offered and received in evidence over [76] the objection and exception of the defendants on account of its date and read to the jury; and also identified a letter from said Jones to the witness dated July 2, 1914, which was marked Exhibit 14, offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury; and also a telegram dated July 3, 1914, from said Jones to the witness which was marked Exhibit 15, offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury; and also a night lettergram from said Jones to witness dated July 6, 1914, which was marked Exhibit 16, offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury; also a letter from said Jones to the witness dated July 6, 1914, which was marked Exhibit 17, which was offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury; also a letter from said Jones to the witness dated July 11, 1914, which was marked Exhibit 18, offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury; also a telegram from the witness to said Jones, dated July 11, 1914, which was marked Exhibit 19, offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury; also a telegram from said Jones to

the witness dated July 31, 1914, which was marked Exhibit 20, offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury.

The witness further testified: "All these letters show that we were simply trying [77] to keep in this market as well as we could and hold it up as well as we could without knowing what the conditions were. After looking at these letters and telegrams I would say there was no general conference at all or that I knew of at that time or about that time between California dealers looking to a change in prices. It appears that there was some discussion with Mr. Cameron of the Santa Cruz Portland Cement Company in regard to doing away with dealers. I had no conversation with any other cement maker than Mr. Cameron and had no intention of doing away with our dealers. If I wished any information I called Mr. Cameron up by phone and asked what they proposed to do, but I attended no meeting of cement men after 1911 or 1912."

Thereupon the witness identified a letter dated August 1, 1914, marked Exhibit 21, written by the Riverside Portland Cement Company from Portland to Walther-Williams Hardware Company of The Dalles, which letter was offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury; and also a letter written by Mr. Jones to the witness, marked Exhibit 22, dated August 1, 1914, which was offered and received in evidence over

the objection and exception of the defendants on account of its date and read to the jury; and also a telegram from said Jones to the witness, dated August 1, 1914, which was marked Exhibit 23, which was offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury; also a telegram from the witness to said Jones, dated August 1, 1914, which was marked Exhibit 24, offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury; also a [78] telegram from the witness to said Jones dated August 7, 1914, marked Exhibit 25, which was offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury; also a letter dated August 17, 1914, from said Jones to the witness marked Exhibit 26, offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury; also a letter from the witness to said Jones, dated August 19, 1914, marked Exhibit 27, which was offered and received in evidence over the objections and exception of the defendants on account of its date, and read to the jury; also a letter from said Jones to the witness dated August 24, 1914, marked Exhibit 28, which was offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury.

The witness further testified: "The letter of August 1, 1914, Exhibit 21, was a letter sent to the general trade by my agent in Portland under my instruction. It indicates that we followed the market. We did not make the price, we went up and down with it. As far as I know and as far as we were concerned the price at Flavel and Astoria did not include the freight rate from Portland to Astoria. We adhered to the policy that if a shipment went straight to Astoria freight from Portland to Astoria was not added to the price. I am not sufficiently familiar with the situation to testify definitely upon that proposition. I was not there."

Thereupon the witness identified a letter written by the witness to R. P. Butchart, dated September 24, 1914, the same was marked Exhibit 29, offered in evidence over the objection of the defendants not only on account of its date, [79] but also on the ground that it was irrelevant as it had nothing to do with the cement business nor tend to establish any of the issues presented by the indictment, but the objection was overruled and the letter admitted in evidence and read to the jury.

The witness further testified: "I don't know when Mr. Butchart became connected with the Oregon Portland Cement Company. I knew it before the plant began to operate in June, 1916. It was a matter of indifference to me personally whether he went into the company or not."

Thereupon the witness identified the letter dated November 16, 1914, written by William G. Hen-

shaw to C. W. Jones. The same was marked Exhibit 30, and offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury.

The witness further testified: "Refreshing my memory from this letter I would say that the Riverside Portland Cement Company withdrew from the Portland market in 1914. I thought it was 1915."

Thereupon the witness identified a letter written by C. W. Jones to the witness, dated December 5, 1914, and a telegram of the same date, marked together Exhibit 31, and offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury.

The witness further testified: I do not recall meeting Mr. Eden of the Superior, Mr. Coats of the Washington or Mr. Cameron of Balfour-Guthrie Company in San Francisco the latter part of 1914. I attended no meeting with these gentlemen nor did Mr. Jones. Jones [80] generally kept me informed of everything that went on, but neither he nor I attended any meeting."

Thereupon the witness identified a letter to A. C. Steckle, written by the Riverside Portland Cement Company, dated March 18, 1915, marked Exhibit 32, and the same was offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury.

Thereupon the witness identified a letter written by C. W. Jones to the witness, dated March 9, 1915, and the same was offered in evidence and objected

to by the defendants not only on account of its date, but also upon the ground that it related only to the interstate bridge matter and was not competent, relevant or material to any charge made in the indictment. This objection was overruled and exception allowed and the letter was received in evidence, marked Exhibit 33, and read to the jury.

The witness further testified: "Mr. Jones was retained as our agent in Portland to close up the business. He was not interested in any fight for cement in Oregon. He was only closing up the business and this is all that we ever knew of the interstate bridge matter as we had no interest in the price of cement in Oregon or Washington."

Thereupon the witness identified a telegram from William Pierce Johnson to the witness, dated June 5, 1915, and a letter from the witness to said Johnson, which were together offered as one exhibit numbered 34, and received in evidence over the objection and exception of the defendants upon the ground that the same did not tend to or relate to any matters alleged in the indictment, but were irrelevant [81] and incompetent for any purpose, but the objection was overruled and exception allowed and the telegram and letter read to the jury.

The witness further testified: "Mr. Johnson was president of the Willamette Pulp and Paper Company with its main office in San Francisco, with one of its plants in Oregon City, and three plants in Oregon. Our company was not agent for any other California brand in Oregon. I have no

recollection what brand of cement it was intended to supply to the Willamette Pulp and Paper Company. The matter was managed undoubtedly by Mr. Jones. Johnson was a personal friend of mine and I was willing to help him as far as possible. We had withdrawn from the Oregon market at that time. We could not furnish Riverside cement as we had withdrawn from the Oregon market and I do not recall what California brand I had in mind to supply."

Thereupon the witness identified the letter from C. W. Jones to the witness, dated July 6, 1915. The same was marked Exhibit 35 and offered and received in evidence over the objection of the defendants on account of its date and read to the jury.

The witness further testified: "This paper does not refresh my mind or indicate that there was a conference about that time. If there was a conference I was not present or any representative of the Riverside Portland Cement Company."

Thereupon witness identified a letter from the Bend Company to the Riverside Portland Cement Company, dated August 20, 1915, marked Exhibit 36. The defendants objected to the introduction of this letter not only on account of its date, but because the same was irrelevant and incompetent as it did not tend to prove or relate to any matters alleged in [82] the indictment, but this objection was overruled and an exception allowed and the letter was received in evidence and read to the jury.

The witness further testified: "Refreshing my

memory by the correspondence, I would say that the Riverside Company left the state of Washington either in 1912 or 1913 at the request of Mr. Eden, the president of the Superior Portland Cement Company, and was not influenced by any threat of the northern California companies nor did the northern California companies threaten to retaliate if the Riverside Company did not leave the state of Oregon. I understood way back in 1910 when the Riverside Company first entered the State of Oregon that Mr. Baker, president of the Pacific Portland Cement Company threatened to go after us in Southern California if we came into Oregon and Washington. Our company left the State of Oregon in the fall of 1914 and has not actively returned to the Oregon market, and the correspondence does not indicate that we were willing to sell secretly. The matter with the Willamette Pulp and Paper Company was a purely personal matter. Mr. Johnson was a friend of mine and I told Mr. Jones, our agent, to see if he could do anything. We were not selling cement in Oregon. I assumed the responsibility for the secrecy of this transaction. I have talked with Mr. Butchart about his connection with the mill in the state of Oregon on one occasion, I think. I think it was a year and a half before the Oregon mill started. Mr. Butchart told me that he felt morally obliged to go on with an agreement to put some money in this enterprise if the rest of the money was raised. About that time I was invited

to participate in this Oregon enterprise and at one time a few of the [83] stockholders suggested that if I would put a little money in it they would like to see me take the presidency. I had some discussion with them about it and determined that I would not. No salary was offered me. We didn't get down to anything of that sort."

And upon cross-examination the witness testified: "About a year and a half or two years, I think, before the Oregon company began the manufacture of cement, when the mill had been built up to a certain point and had spent all its money, and those interested were endeavoring to raise enough more money to complete the mill and start it, I heard that Mr. Butchart had some money in it. I thought I knew many conditions affecting this mill that made me believe it would be a poor investment and I sought Mr. Butchart out as a matter of friendship, told him what I thought of the enterprise, asked him if he was interested in it and he told me he had put a little money into it and had promised to put more in provided the balance which was to be raised was properly raised. He was going to put in \$100,000.00 or \$200,000.00 more. I asked him how long this promise had been out. My whole interest was, if possible, to keep him out of it, and I found that he felt a good deal as I did and said that this promise had been made eight or ten months before at a time when it was expected the balance of the money would be raised within two

or three months, I told him that I thought his moral obligation was ended after waiting so long. He said he did not think it was ended and that he wanted to live up to any moral obligation; that he felt that his word given was as important as his written word. I then suggested that he notify the parties, giving them two or three months more in which to raise the [84] money and if it was not raised in that time he would be exonerated from going ahead if he didn't want to. He made no answer to this, as far as I remember, and the conversation dropped. My discussion of the matter was largely on account of the physical features, the expense of hauling rock from Roseburg and from Dallas, the freight cost as the mill was not placed near enough to Portland to save another freight charge to Portland which is the main distributing market, so that by the time they got their cement into the market it seemed to me they would pay the railroads the largest cost of their cement or a large part of the cost. I was never interested in the enterprise and I never had any other talk with him about the matter. I never had any talk with him at all about any meetings in San Francisco and he never spoke to me about any such meetings.

My attention being called to Exhibit Numbered 5 I would say that what was meant by this exhibit is that the selling price of cement as I understood it was \$1.70 per barrel. This was the price at which we sold to consumers. In this letter in which I say 'I don't imagine any prices are being

seriously maintained in Oregon except by the California mills' I meant that the northern mills at that time were cutting prices in the market and I assumed that the California mills were attempting to maintain a stable market as against the Washington mills. The latter part of this letter distinctly states my policy in this market. Mr. Dinwiddie, mentioned in one of these letters, was a contractor in Portland. I think he had the contract on the Meier & Frank Building. After the date of my letter to Jones of June 11, 1914, we were still cutting rates in Portland on cement. There was never within my experience a stable price [85] in Portland or in the Oregon market. I don't believe we sold any two consecutive bills at the same price,—I mean bills of any size. In this letter I stated to Jones that I assumed that he would stick to the price of \$1.70 in Portland. When we started in the beginning of 1914 the market was \$1.70 with sacks added. The market had been jumping around for all previous years and I made up my mind that I would stick to this price myself. If the market went lower of course I would have to follow but if it went higher I would not follow and that is what I meant by that letter. We absolutely did stick to this price unless the market went lower and then, of course, we followed it, but we stuck to this price when the market went higher.

Mr. Coe, mentioned in Exhibit 14, as in our employ,—an expert on cement properties and went up

and down the Coast on our behalf looking up and reporting on various lime properties. I never knew anything about the occasion of Messrs. Erlin, Coats and Eden being in San Francisco. only information I had about this was a telegram from Jones and he seemingly stumbled upon this fact. In July, 1914, I was advised by our agent, Mr. Jones, that companies were quoting \$1.50 net f. o. b. cars or dock. We met this price as far as we felt it wise to do so. It was a price which meant a cold loss for every barrel sold but we had to meet this price to protect our customers when necessary. Mr. McPherson was an assistant of Mr. Jones in our Portland office. Mr. Parker, mentioned in these letters, was superintendent of our mill at Riverside. I don't remember whether we delivered the cement for the Meier & Frank job or not. I think we did.

My attention being called to Exhibit 7 I would [86] say that we store our cement in a warehouse along the river, the floors of which are more or less open. Moisture would come up and gradually the cement would absorb the moisture and slowly harden from the outside in. When this had gone on to some extent it would become necessary for us to get rid of such cement before we lost it altogether, for when it hardened the strength was taken from it. The cement was becoming damaged and we had to sell it for whatever we could get for it. This policy I think is pursued by all cement companies though some of them recondition it, but then

only get partial results and sell at a reduced price. In one of these letters I speak about freight being 55 cents; that refers to freight from Riverside to Portland and means 55 cents a barrel. Cement is brought from Riverside by rail to tide water and there transferred to schooners that have come down loaded with lumber and are going back empty. They would take cement at a very low rate compared to the regular steamer service. The schooners would take cement up the river to Portland and deliver it and then reload with lumber going south. When the cement reached Portland we had the expense of handling it in Portland, but in this I mean the actual docking expense. The 55 cent rate was the rate by rail to tide water and then by schooner to Portland.

My attention being called to Exhibit 27, dated August 19, 1914, I would say that I had set \$1.70 as my high limit for that year and that when the market here had gone to \$1.90 I still maintained my \$1.70 price.

My attention being called to Exhibit 29, my letter to Mr. Butchart of September 24, 1914, I would say this letter is composed of two parts;—one in regard to the possibility of building a mill in southern California which [87] would become a direct competitor of our mill and the other in regard to a prospect that I had of a material which, when mixed with cement, would make an excellent cement itself and would cheapen the cost of cement in this market. Carl Leonard, mentioned in this

letter, is a German; was a contractor in Los Angeles for a number of years, is interested in a good many cement mills; at one time he had an interest in the Oregon mill and was interested in some other mills with Mr. Boettcher in Denver. As at that time the mills in California could produce double the amount of cement the market would absorb, it seemed a pity for another mill to come in and simply add that much excess output of cement in a small and limited field. Regarding the other matter, if this material referred to turned out as the tests so far as I had gone then indicated, I could produce a cement here that would be equal to Portland cement at 65 to 67 cents a barrel against our old cost at that time of delivering cement in this market of about \$1.65 per barrel. If this material proved successful it would be impossible for any mill away from Oregon to meet the price as the freight rates would add to the cost of delivering here. I considered that if this material turned out as it promised that the Riverside Company would be swept out of the Oregon market with the rest. We have never manufactured this material or sold any yet. I am not quite satisfied with the experiments. I wrote Mr. Butchart about it because I had heard that he was looking into the Oregon mill or was thinking of going into it and knew that if this material turned out as good for cement as the laboratory tests promised, I thought it a matter of friendship for me to let Mr. Butchart know so he (Testimony of Tyler Henshaw.) could stay out of this mill if he saw fit. It [88] was entirely a matter of friendship.

My attention being called to the correspondence from Jones, Exhibit 31, I would say I did not see either Eden, Coats or Cameron at any meeting. I never saw Mr. Cameron of the Olympic until he was on the stand. I never met him. Mr. Eden may have come into the office but I don't know anything about what he was doing in San Francisco and I am sure that Mr. Coats didn't come into the office at all.

I never heard of the matter mentioned in Exhibit 32 or knew anything about this matter. Mr. Jones was merely doing an act of courtesy in business.

All I know about the interstate bridge contract is what is shown by Exhibit 33. I had nothing to do with it and met nobody.

Mr. W. P. Johnson had several paper plants, one located at Oregon City, one at Camas and one probably at Lebanon. He was also interested in two plants over in Canada. We were intimate and it was natural for him to ask me to help him about buying cement.

The telegram from Mr. Jones saying 'representatives of every cement mill in the Northwest are in San Francisco today' was only a matter of information. It didn't concern me. This telegram was sent June 6, 1915. The correspondence between the Bend Company and Mr. Jones,—this is the first time I ever have seen it. I presume all this correspondence came from our office. A represen-

tative of the Government came and demanded the right to go through our files. Mr. Jones wired me and I wired back to open our files and give every possible information. The Government agents went through our files in Portland. I don't think [89] they went through our files in California. letters which the Government offered in evidence were taken from our Portland files. They took some 480 letters I understand, or sheets. Mr. Jones, I think, kept a record of them. When we were in business in Portland we sold cement for what we could get for it and met all competition and cut the price which was fixed from day to day. But one year I fixed the price at \$1.70 as my maximum. I was simply going up and down as a rule with the market and the market in Oregon was going up and down as a rule all of the time we were in business in Oregon. I know about the net result of our operations in Oregon because I had a conversation once with Mr. Reames, the District Attorney, at his request and I told him that we had not made enough money in Oregon during the time we were in business there to warrant the risks we had run. Mr. Reames asked me if our business would prove this and seemed surprised when I told him that I thought so. Upon investigation made by Price, Waterhouse and Company it appears that we lost money in Oregon during the five years we were in business here. These parties are chartered accountants. We quit business in Washington in 1912 or 1913 at the request of Mr. Eden. Our vol-

ume of business there was small and I told him that the only commitment that I had in that territory was to Crowe & Company. I had arranged with Crowe & Company when I went into that market, not for any particular period for I did not know what would be the attitude of other cement companies, whether they would try to drive us out of that market or not. I had told Crowe & Company that if I did quit the market they should have some other cement to sell in place of mine. I quit without any threat on the part of anyone. Our business was very large in southern [90] fornia and there was no mill in the Oregon market and we still had the Oregon market to fall back on. While in business in Washington we made a little money because Crowe & Company were our agents. doing business on a 15 cents a barrel profit to them so we had no bad accounts. I never had any talk with Mr. Butchart about retiring either from Oregon or Washington. I have known Mr. Butchart intimately for several years. I never saw Clark M. Moore that T know of."

Upon redirect examination the witness further testified: "I am still on very friendly terms with Mr. Butchart and discussed this case with him since coming up here. Our conversations were usually around the hotel. I saw Mr. Minor, Mr. Butchart's attorney, a month ago in his office. I went up there on my own volition. I talked with him in a general way about my testimony but went into no details. I have not talked with Mr. Minor since

I gave my testimony on yesterday, that is to say, I have not talked about the testimony. I saw him at the hotel this noon."

Upon recross-examination the witness further testified: "I remember what I talked to Mr. Minor about this morning. He said Mr. Butchart wanted to see me and the talk which I had with Mr. Minor at noon had nothing to do with the trial of this case. When I had the talks with Mr. Minor in his office a month or more ago he did not ask me anything about what testimony I was going to give. I went to his office and gave him the history of what I knew about the business. I went of my own accord. I told him I had been subpoenaed by the Government and asked him whether it would be proper for me to talk to him about what I would [91] testify to without also making the matter known to the Government and he told me to go ahead and tell everything in the world I knew and that anything I said to him I had a perfect right to disclose to the Government. This was all the talk which I had with him and he asked me no questions at all except to say to me to tell the jury the whole thing."

Testimony of C. F. Swigert, for the Government.

Thereupon the District Attorney called as a witness C. F. SWIGERT, who testified as follows:

"I live in Portland and have lived there about 38 years. I am a contractor, president of the Pacific Bridge Company, with an office at the foot of

East Salmon Street. We were contractors for the substructure and floor of the interstate bridge between Portland and Vancouver."

Thereupon the attorneys for the defendants, R. P. Butchart and Clark M. Moore, objected to any questions and any evidence regarding the interstate bridge between Portland and Vancouver upon the ground that that matter was prior to the time that the Oregon Portland Cement Company commenced business and that the said matter was incompetent, immaterial, and irrelevant because it does not bear upon any question tending to show that the defendants Butchart and Clark M. Moore were parties to any conspiracy, but the Court overruled the objection and the attorneys for the defendants excepted to the ruling; the exception was allowed.

The witness testified: "By substructure I mean piers and we use cement for this purpose. We made arrangements to buy cement from the International Portland Cement Company of Spokane, estimated quantity about 300,000 barrels. I can not say how much we finally used. The International Company agreed to supply the cement at \$1.65 per barrel delivered in Portland, [92] conditioned that a rate from Spokane to Portland of $13\frac{1}{2}$ cents a hundred should be put in. We had quotations from other cement companies prior to the time the bids were taken. These quotations were \$1.90 Portland or Vancouver net, but after the contract was given to us we had several proposals, the lowest

of which, as I recall, was about \$1.75 or \$1.78 net to us, but we didn't close on this. The reason for going to Spokane people was that we were customers in Spokane of this company; we were doing work up there. The price in Spokane at that time ran from \$1.08 to \$1.15 per barrel by reason of there being a bitter fight between the International and the Lehigh. The Lehigh Portland Cement Company was a branch of a National institution and had a number of mills, one of them near Spokane, and the International Portland Cement Company was a local concern, not very strong. The Lehigh was trying to put the International out of business and as the International people were friends of ours we had some sympathy for them and also thought it was a good chance by dealing with them of getting the rate established and making a material saving on cement, which we were able to do. We went to them, showed the rates from California, from the Washington cement mills and from Huntington to Portland, and showed we could favor a rate to the Spokane, Portland & Seattle Railway which was best for us because it ran directly to the bridge and this would give the Spokane to Portland a better rate than the Southern Pacific or Washington lines were giving per mile and give the International Company the business at a little better price than they were getting at Spokane,—I think a price which would net them about \$1.11 or \$1.12. We also went to all the other contractors who were friends of ours here [93] and lined up about

60,000 barrels of cement and got provisional contracts, all subject to this rate going into effect. This proposition was attractive, both to the International Portland Cement Company and to the Railroad Company as there was 60,000 barrels of business involved. We interviewed with some of the Washington Portland Cement people, interviewed in Mr. Skinner's office, and the Washington coast mills were very much adverse to having this rate put in and said—at least Mr. Coats said, that if we did insist upon Mr. Skinner keeping his promise to put in this rate he would see that we were protected in price. We told him that we were already under contract with the International Portland Cement Company and without their sanction could not do it. Skinner was the traffic manager of the Spokane, Portland & Seattle Railway. He promised us the 13½ cent rate. He called me to his office and said Mr. Coats wanted to see me. They were making strenuous efforts to prevent this rate being put in. I had never met Mr. Coats before nor have I met him since. I think he was the president of the Washington Portland Cement Company and Mr. Eden president of the Superior Portland Cement Company. This occurred in the spring of 1915, probably in April or May. We didn't advertise until the matter was closed up. The cement supplied to us was almost entirely Superior or Santa Cruz, California Cement. Superior is a Washington Cement, made at Cement, Washington, somewhere up toward Puget Sound. Santa Cruz

cement comes from California. We paid for this cement the same price, \$1.65. We had the right to buy from the Spokane mill all our needs for that year, everything that was contracted for for that year whether the contracts ran over or not, at \$1.65. When these contracts were finished we never got any cement as cheap as that. [94] We did get various prices all the way up to the present price. At first, when we first began the work we placed our orders with the Spokane mill and they distributed them. They did not supply us with any cement of their own manufacture in this market. They did at Spokane. When orders were placed with the International Company Superior or Santa Cruz cement was furnished on these orders. I think through my influence I got Santa Cruz as it was on our wharf on the other side of the river. I don't recall any new contract being made but after a while we ceased to place orders through the International Cement Company and placed them either directly with the Santa Cruz agent here or with Mr. Bennett of the Superior. We continued buying Spokane cement in Spokane for work in that territory. We didn't have to make any change in the price we were paying them but the price in Spokane very soon went up. The fight was settled but it didn't affect us because we had already contracted."

Thereupon a certain paper being a contract between the Superior Portland Cement Company and the Pacific Bridge Company was shown to the wit-

ness and the same was offered in evidence. The defendants each objected to the introduction of this paper, waiving proof thereof, upon the ground that it didn't tend to establish any issue in the case or tend to show any guilt on the part of the defendants or either of them or to show any conspiracy, but the Court overruled the objection and to this ruling the defendants and each of them excepted and the exception was allowed, and thereupon the said paper was marked Exhibit 38 and introduced in evidence and read to the jury.

The witness further testified: [95] "This contract seems to be for all the cement we expected to use, but we didn't get it all from these people. We wished the Santa Cruz people to get a considerable quantity of it because if we got it from them we got the wharfage over our dock, got the additional benefit of handling it and storing it. I don't recall exactly how this was brought about; it must have been by some amicable arrangement. The contract, Exhibit 38, bears date March 6, 1915. The letter transmitting it is dated July 1, 1915. I cannot explain this. The bridge contract was let February 10, 1915, and our original contract with the International people was probably between that date and March 1st. We had propositions before our bid went in to the Bridge Commission and I negotiated afterwards and had bids then for cement. I don't recall exactly but we had various prices below \$1.90, I think some as low as \$1.70 or \$1.75. We got these bids before we got the bid for \$1.65, but we

were negotiating all the time with the International Company and had no expectation of getting cement from anyone else. We were conducting these negotiations we thought without the knowledge of other cement companies but kept up our negotiations with them, not believing that we could get as low a price as we thought we could get from the International. We got prices from the coast mills I think as low as \$1.75, I know below \$1.90."

Upon cross-examination this witness further testified: "The bridge contract was let upon bids which were advertised for. I don't think there was any advertisement for bids for cement. I canvassed the market here for bids on cement; went to the agent of the Santa Cruz, went to Mr. McDonald. Oregon Cement Company was not in business at that time. I went to Mr. Bennett over in Vancouver, agent [96] for the Superior Company. I should say we went to every source that we thought was likely. I didn't conduct all the negotiations. Mr. Simons conducted some of them. My general business is contracting bridges and other structures; have been in that business for about 40 years throughout the country; have used a great deal of cement and purchased it wherever we could get the cheapest price. During this period there was a variation in the price of cement and competition for our business. About this time the price seemed to have congealed or solidified at about \$1.90. They had been selling cement at a good deal less and generally it was understood

that they were not making any money. I think everybody decided they had better at least make a little money or at least get the price of their product,—everybody except the two companies in Spokane; they continued a bitter fight between themselves. The Lehigh Company was a national institution with a number of mills. The International Company was a local company and had one mill and it was not particularly strong. The demand for cement was not equal to the supply and for some reason or other the Lehigh seemed to be trying to put the International out of business. Some time afterward the price of cement in Spokane went up. I don't know how high. We finished our work there and got all the cement we required at the old price. We got the cement part from the Superior, part from the Santa Cruz. The color of the Superior and the Santa Cruz was somewhat different and each pier had to be of the same color above water. Santa Cruz is a light colored cement, Superior is a dark colored cement. There is no difference in the quality of the two cements. Cement in this market is supplied by a number of mills. There may be slight [97] differences in quality but all cement must meet a certain standard. Generally speaking all cements are the same. Nobody pays any particular attention if the cement meets the test unless he wants a particular color on some special work. The tests are prescribed by the city for city work, by the State Highway Commission for state highway work, by the

Consulting Engineers of the interstate bridge for that work. Generally speaking the tests are very much alike, varying only in small details. I had some talk with Mr. Coats about the rate but not with any other manufacturer. My bid for this bridge work was not based on the price made me on cement in Spokane coupled with the conditions that the rate should be 13½ cents. We thought this rate might be beaten but we thought we could get the Washington State Railway Commission to put the rate in effect if the Railroads didn't. We had good reason to believe that the Washington companies were quoting Seattle contractors lower prices for cement than they were quoting us and we started in to circumvent this. This Spokane rate was never put in. I took some part in the fight over the rate. I do not remember what was the rate on cement from Spokane to Portland at that time. It was a prohibitive rate,—I should say two or three times the rate we asked for. There are about five barrels of cement to a ton, four bags to a barrel and the 13½ cent rate means 13½ cents per hundred pounds, not per barrel. This would be about 54 cents to the barrel. The Oregon Portland Cement Company was not manufacturing at that time. I think they were building a mill at Oswego. I don't know whether they were reorganized at that time, but they were not in the market and had no mill to supply cement and I didn't communicate with them. Mr. McDonald I spoke of [98] represented one of the California mills."

Upon redirect examination the witness testified: "We do not consider that there is any particular difference in the quality of the various cements. You can't use any cement on any job until it has been tested and passed and each load must be tested and passed. If the cement passes the test and complies with the specifications that is all we care for. The only other question is a question of price and terms. All companies guaranteed that their cement would pass the test."

Testimony of F. M. Wylie, for the Government.

Thereupon F. M. WYLIE, called as a witness on behalf of the United States, testified as follows:

"I live at Aberdeen, Washington; have lived there for about 18 years. Prior to 1915, for about ten years, I was manager of the Aberdeen Manufacturing Company, engaged in the business of buying and selling building materials, mill work, including brick, lime, cement, etc. In 1914 we handled the Cowell Company's cement made in California and got all the cement we wanted from the Cowell people. In December, 1914, we were advised we couldn't get cement from them after January 1, 1915."

Thereupon the witness identified a letter marked Exhibit 39, dated December 28, 1914, and the same was offered and received in evidence over the objection and exception of the defendants on account of its date and read to the jury.

(Testimony of F. M. Wylie.)

The witness further testified: "We tried after that time several other California companies without success. I don't remember whether the Cowell Lime & Cement Company continued to supply us with lime and plaster after that, but I left the Aberdeen Manufacturing Company [99] in April, 1915."

Thereupon the witness identified a carbon copy of a letter dated February 2, 1915, addressed to the Treasury Department, marked Exhibit 40, and offered said letter in evidence. To this letter the defendants objected upon the ground that it was not competent or relevant, that it was not evidence of any fact, a communication addressed to the Treasury Department, unsworn to and the facts, if they were facts, such as the letter details are facts which must be proven by sworn testimony. The Court however overruled the objection and admitted the letter in evidence and to this ruling the defendants excepted and the exception was allowed. Thereupon the counsel for the United States offered to read the letter to the jury and the defendants by their attorneys duly objected to the reading of the letter to the jury upon the ground that what the letter contained would not be evidence, but the court overruled the objection, stating that the statement in the letter was not evidence of any facts other than that a complaint was made, and to this ruling the defendants excepted and the exception was allowed and the said paper was read to the jury, the Court instructing the jury that the letter (Testimony of F. M. Wylie.)

was introduced simply for the purpose of showing that a complaint was made at the date of the letter and that the letter was not evidence to be considered by the jury as evidence of any facts stated in it.

Upon cross-examination the witness further testified: "I cannot say what proportion of our business was in cement. Some years we sold \$15,000.00 to \$20,000,00 worth of cement. We were manufacturers and dealers in sash doors, and mill work and handled all kinds of building material, sold to the builder, consumer or contractor. We F1007 bought our cement from the manufacturer, put it in stock and sold it. Mr. Lebo was in the building material business in the same line in which we were engaged, but not interested in lumber. He was a dealer in cement. Mr. Darragh did not handle building material except cement. He had a dock and freight came over his dock from California. He was a dealer. In 1914 he handled cement of the three Washington companies. In different years we handled different cements but in 1914 we hanonly the Cowell cement. Mr. Darragh handled the Pacific Portland cement. Those were the only cements handled in that market as far as I recall. I don't know whether we were all paying the same price or not. I presume we were paying about the same price. We always had a little more or less jockeying around when good jobs came up. I can't say what my competitors were paying but I think we all paid about the same price. That was usually the way but when any big job came up the (Testimony of F. M. Wylie.)

price was somewhat shifted to get the business. At that time the companies selling in Aberdeen sold through the dealers only, consumers buying from the dealers. As a rule the price we paid was the price set by the companies for that particular point. Every point would have a different price which would be effected by the freight. When we went out to get business we got business at the best price which we could obtain and so did all the other dealers. Ordinarily the manufacturers set a price for Aberdeen. We bought from the manufacturers and in our case we got a discount of 20 cents a barrel. We were at liberty to buy cement from anybody we pleased and if anybody had offered cement cheaper than Cowell I presume we would have bought it."

Upon redirect examination the witness further [101] testified: "Balfour-Guthrie manufactured a cement called the Olympic. We never bought any cement from Balfour-Guthrie. Lebo handled the cement of the three Washington companies, and the brand called Olympic, so far as I know, was manufactured by Balfour-Guthrie."

Testimony of J. T. Bennett, for the Government.

Thereupon J. T. BENNETT called as a witness on behalf of the United States, testified as follows:

"I live in Vancouver, Washington and am in the hardware business. In 1914 and 1915 I also carried a partial line of building material, including lime and cement. I did my business under the

name of Bennett Hardware Company. In 1915 I handled the Superior cement, manufactured at Concrete, Washington. Olympic wasn't handled much there at that time. The Columbia Feed and Fuel Company carried the Santa Cruz cement which was a California cement. I don't think any other brands were carried at that time. The Red Ash Coal Company have never been regular dealers in cement. Off and on they carried Olympic, I think The California companies disconno other brand. tinued selling cement in Vancouver during 1914. At the beginning of 1915 the price of cement seemed to have been established at \$1.90 to the consumer. Mr. Lille, the salesman of the Superior Portland Cement Company was a good friend of mine and he made a trip through there to let me know that the fighting methods were done and that there would be a new deal on."

Thereupon the attorney for the United States asked the witness the following question:

"What did he say to you about it?"

To this question and to any statement made by Mr. [102] Lille the defendants objected upon the ground that it was incompetent as Mr. Lille was merely a salesman and his statements would not bind any of the defendants in regard to their policy unless it was shown that he had the power to make statements or representations. This objection, however, was overruled by the Court and the defendants excepted and the exception was allowed.

The witness further testified: "I don't remember Mr. Lille's exact words but he gave me to understand that there was a meeting in San Francisco of the cement manufacturers of the Coast, including Washington and California and that there was no doubt at all but that there would be an adjustment of prices and that prices would be much higher and that there would be no deviation from the prices, and advised me to buy all the cement that I thought I could handle. I acted upon this advice and bought cement, several carloads. A few days afterward we had a wire that the price would be \$1.90 with usual dealer's commission. This was a raise. I think that our prices were around \$1.55 before that. I was dealing in cement at the time the contract was let for the interstate bridge. I wrote to the Superior Portland Cement Company to ascertain if they wanted me to represent them in that case and we busied ourselves finding out who would get the contract and after finding who was the successful bidder I saw Mr. Simons of the Pacific Bridge Company and quoted him the price which I had received of \$1.90 per barrel f. o. b. Vancouver or Portland for Superior cement. The contract I learned went to the International Cement Company of Spokane but this company did not supply its brand. A part of the cement supplied was Superior cement." $[102\frac{1}{2}]$

Thereupon the witness identified the letter written by the witness to J. C. Eden and reply from J. C. Eden upon the back of said letter, the same

marked Exhibit 41, and the same was offered in evidence by the attorney for the United States and to this letter the defendants objected upon the ground that it was simply correspondence between the Superior Company and its agent relating to a Commission and did not tend to establish any issue in the case. The Court overruled the objection and admitted the letter in evidence, and to this ruling the defendants excepted and the exception was allowed and the letter, Exhibit 41, was read to the jury.

Thereupon two invoices were identified by the witness, marked Exhibit 42, introduced in evidence and read to the jury.

The witness further testified: "I only remember trying to buy California cement once after the first of January, 1915. It was for a little house in Vancouver in which Santa Cruz cement had been used and owing to a difference in the color they wanted Santa Cruz cement to repair it with. The writer went to Portland and attempted to buy it and was unable to do so unless we paid the retail price in Portland and had it trucked over to Vancouver. There was some reason why they didn't want to sell in Vancouver."

Thereupon the witness identified a letter marked Exhibit 44, and the answer on the back of it, and the same was offered in evidence by the attorney for the United States and to this evidence the attorneys for the defendants objected upon the ground that the same was not competent for any purpose and

did not undertake to establish any of the [103] charges of the indictment, but the court overruled the objection and the defendants excepted and the exception was allowed and the said letter and the answer were received in evidence and read to the jury.

The witness further testified: "In the spring of 1916 Mr. Hollister, representing the Oregon Portland Cement Company called on me. It was after their plant had begun operation."

Thereupon the witness identified a letter and answer thereto marked Exhibit 45, and the same were offered in evidence on behalf of the United States. The defendants objected to the evidence upon the ground that the same was incompetent and irrelevant and did not tend to prove any of the allegations of the indictment, but the objection was overruled and to this ruling the defendants duly excepted and the exception was allowed and the letter and answer were received in evidence and read to the jury.

Upon cross-examination the witness testified: "I don't know the date on which Mr. Lille called on me. It was two or three days prior to the time when the price of cement was raised to \$1.90 in our territory. Before that time the prices had been as low as \$1.55. They started in around \$1.90 and battled around until the price got down to \$1.55. I am not sure that Mr. Lille's call was in 1915. I cannot identify the year in which he called. Mr. Lille was a good friend as a salesman usually gets to be. I

testified upon the former trial of this case and was asked something about Mr. Lille. I don't remember that I said anything at that time about his being a particular friend. I was sure it was Mr. Lille who called. He told me a good many things and one thing was [104] that the price of cement would be raised. He told me there was a meeting of the different manufacturers of cement on the Coast in San Francisco. They had all gone down there and there was very little doubt but that the price of cement would go up. Upon the former trial of this case I did testify but as to when this conversation took place I was not sure, but I thought it was Mr. Lille with whom I had the conversation, but they changed traveling men or salesmen about that time. I now say I was sure it was Mr. Lille. It seems I was not sure at the time I testified before. I have thought it over since I testified before and have become convinced that it was Mr. Lille. Regarding the letters between myself and Mr. Eden, both Mr. Eden and I considered that because this cement was to be used on the Washington side at Camas that it should be bought from the Washington mills. I didn't figure I had a mortgage on any business because it was in Oregon. The buyer was in Oregon but the cement was to be used in Washington. I did all I could to sell the cement. I did not feel that we were entitled to this sale because it was on the Washington side and in my county. The cement might be bought in San Francisco or Portland. I had a con-

versation with Mr. Hollister when he called. I told him I was handling Superior cement. I believe he said that he could ship cement immediately. He named a price but I do not remember what it was. At the time of his call I had nothing more than the dealer's discount of 10 cents a barrel. At one time the Superior had been giving me a further concession. Upon the former trial I testified that previous to this time I had a special commission of 5 cents a barrel over anybody else. When I began to handle Superior cement [105] eleven or twelve years ago it was rather unknown in the territory and some of it had failed when it was new and the Company offered me a concession to sell it. Besides it was worth a little more to handle cement shipped from such a distance because of the long time it took to get it and the greater expense in returning the sacks, and so they made a special concession of 5 cents a barrel but did away with it later. I rather think this concession was taken away when the price was established at \$1.90. The sale price would be quoted to me from Concrete and Portland as the same. It was advantageous to get it from Portland as I could phone to Portland and have the cement the next day and wouldn't have to carry so much stock. The larger the stock the more money it cost to carry it. If I wrote to Concrete it would be 5 days before I could get cement where I could get it from Portland in one day. This is worth something to the dealer and to the consumer. Upon the former trial I testified that my neighbors

and I 'whipsawed' as we call it. We would find which we could get the lowest price on, reporting to each other, and get the prices down and bought at practically the same prices.''

At this time the transcript of the evidence of this witness taken upon the former trial, was placed in the hands of the witness and his attention was called to page 70 thereof wherein he testified as follows:

"Then you bought at the same prices as other parties? A. Practically, yes.

Q. And at the same price at which you could buy from any other manufacturer?

A. To get down to details on the thing, the Superior people were making me, previous to this increase, five cents better than I could buy cement for in Portland, these California branches [106] here. They did that because rather hard to get cement from the Superior Company but could get on a day's notice from Portland from the California output; so the Superior people made us a better price to do so.

Q. So you continued to get five cents better price from the Superior on it?

A. I am telling you the price fluctuated up and down and around previous to July, 1914, and I was supposed to be getting about five cents better.

Q. And then you claim you were getting about five cents from the Superior better price?

A. Yes, sir.

- Q. Now, you said the price was the same to the consumer; what do you mean by that?
 - A. Did I say that?
- Q. That is what I understood. The consumers were paying the same price, you said, after 1914.
 - A. I don't think I did.
- Q. I thought you said the price was the same to the consumer. What do you mean by price to consumer?
- A. The price to the consumer in carload lots on cement was at all times—or at that time was at all times ten cents more than we paid for it in car lots.
- Q. What you mean is that the consumer paid you ten cents a barrel more than you paid the mills?
 - A. Yes, sir.
- Q. And that is all; the consumer had to pay that to you and not to the mills, didn't they—the dealer, not to the mill?
 - A. Yes, they very seldom bought from the mills."

And the witness said: "I didn't intend to say at that time that I got five cents better for the Superior than anyone else after the \$1.90 price was established. In fact, I couldn't buy from anyone except the Washington mill after the price was established. I bought only from the Superior. I am not sure when this price of \$1.90 was established. When I testified before it evidently was in my mind that it was [107] established in July, 1914. Previous to the time when the price was established other dealers in Vancouver were buying from California companies but didn't continue to buy from

them afterward. They bought from the Washington company. I don't believe any California cement was sold in that market after July, 1914 to speak of. I don't remember the price Mr. Hollister quoted. I think he was higher than I was paying to the other people. In the two Exhibits 42 and 43, one of December 1, 1915 and the other of October 5, 1916, cement seems to have been differently quoted. The price was the same. In the first one cement was quoted at \$1.80 and sacks at 10 cents which means 40 cents a barrel for the two items and in the other one it was charged at \$2.20 all in one item. I did have a special agreement regarding sacks toward the latter end of the time that I handled cement. I didn't have to pay for the sacks at all, the manufacturer paying the return freight on the sacks. At the very end of the Company became arbitrary and required us to pay for the sacks. I quit handling cement sometime after October, 1916."

Testimony of Fred W. Harrington, for the Government.

Thereupon FRED W. HARRINGTON, called as a witness on behalf of the United States, testified as follows:

"In 1914 I was vice-president and manager of F. T. Crowe & Company in Portland, dealing in cement and other materials, handling Santa Cruz and Standard cement, manufactured by California companies. Fred H. Muhs was the general man-

(Testimony of Fred W. Harrington.)

ager of the Santa Cruz and Standard companies. During 1914 the Santa Cruz and Standard changed their policy in regard to selling cement in Washington. They stopped selling in Washington and all the [108] Washington companies stopped selling in Oregon. A great many conferences were held in San Francisco and the change occurred after these conferences. I got my information about the change of policy from Mr. Fred Muhs at various times and at various places, sometimes by letter, sometimes by wire and sometimes by personal conversation. In the lobby of the Palace Hotel or St. Francis Hotel in San Francisco he told me that the Washington mills agreed not to go south of Salem and that the California mills would not go into the State of Washington. I tried to make an exception of the Columbia Feed & Fuel Company at Vancouver, to whom we had been selling for years, but Mr. Muhs would not permit it. This conversation was either late in 1913 or early in 1914. No statement to the effect that the Washington companies tried to get their territory extended as far south as Eugene was made to me by S. H. Cowell, W. H. George, F. G. Drum, R. B. Henderson, Frank W. Erlin, William G. Henshaw, Tyler Henshaw, George T. Cameron, Fred H. Muhs, John C. Eden, A A. Sutherland A. F. Coats, Alexander Baillie, W. P. Cameron, R. P. Butchart or Clark M. Moore."

Thereupon a letter marked Exhibit 46, identified by the witness was offered in evidence, the witness (Testimony of Fred W. Harrington.)

testifying that the pencil memorandum in the lower corner was made by E. G. Allen who was in the employ of F. T. Crowe & Company, quotation man, and was made in the regular course of business in the office. To the introduction of this letter the defendants objected upon the ground that the same was incompetent and irrelevant as it does not tend to establish any issue in the case, but the court overruled the objection and the defendants duly excepted, the exception was allowed [109] and the letter was introduced in evidence and read to the jury.

Thereupon the witness identified a further letter marked Exhibit 47 as a letter which came through the office in the regular course of business and the same was offered in evidence and objected to by the defendants upon the ground that the same was incompetent and irrelevant and did not tend to establish any issue presented by the indictment, but the Court overruled the objection and the defendants duly excepted, the exception was allowed and the letter was introduced in evidence and read to the jury.

Thereupon the witness identified a letter marked Exhibit 48 and the same was offered in evidence, and to this letter the defendants duly objected upon the ground that the same was incompetent and irrelevant and did not tend to establish any allegation of the indictment, but the Court overruled the objection and the defendants excepted, the excep-

(Testimony of Fred W. Harrington.) tion was allowed and said letter was introduced in evidence and read to the jury.

Upon cross-examination the witness further testified: "Cement was shipped to F. T. Crowe & Company on consigned account. We paid freight and warehouse charges, sold the cement, deducted our commission and remitted the balance to the cement company. All accounts were carried in our name. F. T. Crowe & Company got a Commission for selling of 10 cents a barrel all the time and 20 cents a barrel in some cases. Where we sold to a dealer in the country we got 20 cents a barrel, the dealer got 10 cents and we got 10 cents. We were selling to consumers as well as to dealers and these [110] companies were selling to consumers as well as to dealers. Prior to the date of these letters, commissions had been allowed dealers in the city of Portland at various times but afterward no commissions were allowed dealers in the city of Portland. I moved away from Portland in November, 1917. In 1914 F. T. Crowe & Company were agents for both Standard and Santa Cruz but about the first of March of the year 1914 the Standard established their own agency in Portland and later in the year, in October, the Santa Cruz established their own agency, and that was the end of the concern of Crowe & Company. My connection with Crowe & Company ceased in December, 1914. The agent for the Standard was Mr. James. The agent for the Santa Cruz was Dan Maher. After the Standard established its agency we didn't handle

(Testimony of Fred W. Harrington.)

Standard and after the Santa Cruz established its agency we did no new business for the Santa Cruz. F. T. Crowe & Company had also an office in Tacoma, Seattle and Spokane as well as in Portland. Their business was about the same kind in all places. They handled cement but over there they handled Riverside. I think the Riverside Company pulled out of the state of Washington in 1914 and then F. T. Crowe & Company handled Superior or Washington cement. I tried to get a concession from Mr. Muhs in favor of the Columbia Feed & Fuel Company but he would not permit it and said, 'We are not going to sell in the state of Washington.' I objected as all the business we had in the state of Washington was in Vancouver. We hated to lose it. We may have sold a few jags of cement that went over on the North Bank road but had no dealers except in Vancouver. My recollection was the conversation with Muhs occurred late in the fall of [111] 1913 or early in 1914. I think it was in the fall of 1913, I remember it was late in the fall when I was down in California. The conversation took place in the lobby of the Palace Hotel. Mr. Muhs came downstairs with one or two other gentlemen and I asked him what had been done. I am not sure whether Mr. Hacker was present or not. He was the treasurer of F. T. Crowe & Company and lived in Tacoma. Mr. Muhs said they had fixed it up and they were going to get out of Washington and the Washington companies agreed not to sell south of Salem. At that time, when I was selling

cement for the Santa Cruz or Standard in the Portland market there were the Riverside Portland Cement Company, the Standard and Santa Cruz Portland Cement Companies, the Henry Cowell Lime & Cement Company, the Pacific Portland Cement Company, the Washington Portland Cement Company, the Olympic represented by Balfour-Guthrie & Company; the Superior sold a little but not much, quoted once in a while but didn't sell much. These were the only companies selling in the Portland market. All of them were more or less active. I know Aman Moore. We were not particular friends. I think we sold to the Portland Cement Company when they started to build the mill at Oswego, reinforced steel for their mill. I never had any connection with that concern or with the Oregon Portland Cement Company and never contemplated having any connection with either of them; yes—at one time in order to get a settlement of our claim for the steel for which we had not been paid someone came around with the proposition that we take so much stock. The Superior did very little business. Their agent was named Nickerson. The Pacific Portland Cement was represented by Statter, the Riverside by Charles Jones, at one time by [112] R. A. Hume & Company. I know all of these men. The Santa Cruz and Standard mills are separate but controlled by the same interests and had the same president, manager and same officers."

Thereupon the attorney for the United States offered in evidence transcript of the testimony of W. E. Hacker, taken upon the former trial of this case and particularly the exhibits offered upon the former trial with the testimony of said Hacker, marked Exhibits 49 to 58 inclusive, and thereupon the attorneys for the defendants objected to the introduction in evidence of Exhibits 49, 51, 53, 54, 56, 57 and 58 and to any evidence of this witness in regard to said exhibits or the matters therein mentioned, upon the ground that the said exhibits and said testimony related entirely to the business of the Washington companies within the State of Washington and not at all to interstate commerce, and objected to each of said exhibits and to all testimony in regard to each of said exhibits upon the same ground, but the Court overruled the objection and an exception was allowed, and thereupon the testimony of said witness, Hacker, taken upon the former trial was read to the jury, wherein said witness testified as follows:

"I live in Los Angeles, am in the paving business for the Warren Brothers Company. I was secretary and treasurer of F. T. Crowe & Company from 1902 to the end of 1916, located at Tacoma, Washington. In 1913, 1914, 1915 and 1916 F. T. Crowe & Company was in the building materials business, handling cement in considerable proportions. In 1913 and 1914 they were dealers for the Superior Portland Cement Company, a Washington company, covering the territory tributary to Tacoma and to

the southwest. The firm also [113] had an office in the city of Portland. In the city of Portland the firm were dealers for Standard Portland Cement Company and the Santa Cruz Portland Cement Company, California companies. My business connected principally with the Tacoma office. During 1913 and 1914 beside the Superior, the Washington Portland Cement Company and the Olympic Portland Cement Company, Washington companies, were selling cement about Tacoma. The California companies were not serving that portion of Washington during those years. There was a range of prices on cement. I cannot tell you exactly what they were. They were lower in the early part of 1914 than later in 1914. The prices were raised I think about June or July, 1914."

Thereupon the witness identified a letter marked Exhibit 49, dated March 24, 1914, from the Superior Portland Cement Company to F. T. Crowe & Company at Tacoma, and the same was offered in evidence and to this letter the defendants by their attorneys objected upon the ground that the same was dated prior to the formation of the Oregon Portland Cement Company and also upon the ground that it related wholly to intrastate business. The Court overruled the objection and an exception was allowed and the letter was introduced in evidence and read to the jury.

The witness testified: "When this letter was received prices were supposed to be uniform. I know Mr. Fred Muhs. I don't know what his title

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(Testimony of Fred W. Harrington.)

was. He was connected with the Santa Cruz and Standard Cement Companies—I think as sales manager. These companies are controlled by the same officers."

Thereupon the witness identified a letter written by the witness to Fred H. Muhs, dated at Tacoma, April 10, [114] 1914, and the same was offered in evidence. The defendants objected to this letter not only because it antedated the formation of the Oregon Portland Cement Company, but also upon the ground that it does not tend to sustain any issue in the case and does not tend to show any combination but rather to invite combination, but the Court overruled the objection and the defendants excepted and the exception was allowed and the letter was introduced in evidence and read to the jury, marked Exhibit 50.

The witness further testified: "At the date of this letter the Washington mills were competing in the State of Washington and scrapping. It was our hope that they would get together subsequent to that date. I can't say that they did."

Thereupon the witness identified a letter dated June 1, 1914, written by the Superior Portland Cement Company, marked Exhibit 51 and the same was offered in evidence. To this letter the defendants objected upon the ground that the same antedated the formation of the Oregon Portland Cement Company, and also upon the ground that it related entirely to intrastate business. The Court overruled the objection and to this ruling the defend-

ants excepted and the exception was allowed and thereupon the letter was introduced in evidence and read to the jury.

The witness further testified: "At the date of that letter we were urging the Washington companies to fix the price of cement in the State of Washington. I do not know whether the prices were so fixed or not."

Thereupon the witness identified a letter written by him to Fred H. Muhs, dated July 2, 1914, marked Exhibit [115] 52, and the same was offered in evidence and introduced in evidence over the objection of the defendants on account of its date and read to the jury.

The witness further testified: "Muhs mentioned in this letter is Muhs of the Standard and Santa Cruz Company. Coats was the head of the Washington Portland Cement Company. We were dealers for the Superior. G. B. & Co. mentioned in the letter means Galbreath-Bacon & Co. When this letter was written negotiations between the Washington companies had not been completed and so far as I know were never completed. I communicated with San Francisco regarding the Washington mills because of our previous close connection with the San Francisco mills. They were not serving Washington with their cement."

Thereupon the witness identified two letters, each dated July 17, 1914, marked Exhibits 53 and 54 and the same were offered in evidence. To the introduction of these letters and each of them the

defendants objected upon the ground that they antedated the formation of the Oregon Portland Cement Company and upon the further ground that they related to solely business of Washington manufacturers within the State of Washington, to intrastate business and not interstate business; but the Court overruled the objection and an exception was taken to this ruling and allowed and the said letters were introduced in evidence and read to the jury.

The witness further testified: "It would seem that when these letters were received the Washington companies had completed their arrangements [116] for a uniform price of cement. I know of no meeting between the officers of the various Washington companies in San Francisco shortly prior to July 17, 1914, and had no conversation with any of the officers of the Washington companies in regard to such meeting. I am unable to say whether the price of \$1.90 f. o. b. Seattle remained the same throughout the year 1914. I think my firm handled Olympic cement in Seattle."

Thereupon the witness identified a letter written by him to Mr. Muhs dated July 23, 1914. The same was marked Exhibit 55 and offered and received in evidence and read to the jury over the objection and exception of the defendants that the letter was written prior to the formation of the Oregon Portland Cement Company.

The witness further testified: "We were not selling cement for the California companies in

Washington. I think the California companies withdrew from Washington in 1913. I think the Washington companies sold in Oregon subsequent to July 17, 1914, and sold as far as their rates would permit them to go. I don't know whether they sold farther south than Salem. The letters of the Washington companies quoted the same price."

Thereupon the witness identified a letter dated August 27, 1914, marked Exhibit 56 and the same was offered in evidence. To this letter the defendants objected upon the ground that it was written prior to the formation of the Oregon Portland Cement Company, and upon the further ground that it related wholly to business within the State of Washington, all companies manufacturing cement in said state, to intrastate and not interstate business, but the Court overruled the objection and the defendants excepted [117] and the exception was allowed and the letter was introduced in evidence and read to the jury.

The witness further testified. "We didn't bid upon that contract. I don't think the agreement among the Washington companies continued. We suspected it would be changed every day. When the Oregon Portland Cement Company came into the market we were out of the Portland market. The Washington Companies had eliminated their dealer."

Thereupon the witness identified letter from the Superior Portland Cement Company to Crowe & Company of Seattle, dated December 31, 1914,

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(Testimony of Fred W. Harrington.) marked Exhibit 57: also a letter from the Olympic Portland Cement Company to Crowe & Company of Seattle, dated December 31, 1914; also a letter from the Olympic Portland Cement Company to Crowe & Company of Seattle, dated January 4, 1915: also a letter from the Olympic Portland Cement Company to Crowe & Company, dated January 2, 1915; also a letter from the Superior Portland Cement Company to Crowe & Company of Tacoma, dated January 12, 1915; also a letter from the Superior Portland Cement Company to Crowe and Company, Seattle, dated February 1915, and all of said letters were offered evidence marked Exhibit 57, and to each and all of these letters the defendants objected upon the ground that the same were dated prior to the formation of the Oregon Portland Cement Company, and upon the further ground that the said letters related entirely to the business of Washington manufacturers within the state of Washington and did not relate at all to interstate commerce, but the court overruled the objection and to this ruling the defendants excepted and the exception was allowed and said letters were introduced in evidence [118] and read to the jury.

The witness further testified: "From this correspondence it appears that as all the Washington companies had their main offices in Seattle they had decided to leave no other dealers in the Seattle market and that they had adopted the policy of

(Testimony of Fred W. Harrington.) charging the same price for cement. This policy continued until August, 1916, as far as I know. With relation to Tacoma the price at Tacoma about the time of the date of these letters was \$1.90."

Thereupon the witness identified letter from Superior Portland Cement Company to Crowe & Company of Tacoma, dated January 13, 1916; letter from the Superior Portland Cement Company to Crowe & Company dated January 13, 1916; letter from the Washington Portland Cement Company to Crowe & Company, of Seattle, dated January 12, 1916, and letter from the Olympic Portland Cement Company dated January 11, 1916, to Crowe & Company, all of which were marked Exhibit 58 and offered in evidence. The defendants objected to the introduction of said letters and to the introduction of each of them upon the ground that the same related wholly to business of the Washington companies within the State of Washington and did not relate at all to interstate business, and upon the further ground that the letters were all prior to the date upon which the Oregon Portland Cement Company placed its cement upon the market; but the Court overruled the objection and to this ruling the defendants excepted and the exception was allowed and the letters were introduced in evidence and read to the jury.

The witness further testified: [119] "These letters give the same terms for the city of Seattle and indicate that the three companies had an agreement as to price in Seattle. The situation con-

tinued as long as I was connected with F. T. Crowe & Company. We never heard of Oregon Cement. I don't know when it was first manufactured or whether the Washington companies then withdrew entirely from the State of Oregon. I do not know about any conferences held in San Francisco by Washington and California companies. The Standard and Santa Cruz left the State of Washington in 1912 or 1913."

Thereupon the attorney for the United States asked the witness why the Standard and Santa Cruz companies left the State of Washington, and to this question and to any evidence given in answer thereto the defendants objected upon the ground that the same was incompetent, that it could only be by written communication or hearsay.

The witness answered the question: "Before the Washington companies were started, Oregon and Washington were dumping grounds for the California companies and the California companies sold into Montana and Idaho before they met eastern competition. When the Washington cement mills were started the California mills were naturally restricted as to that territory which the Washington mills could supply cheaper by reason of freight rates. At that time the California companies were still selling in eastern Washington up to Spokane. The rates were not such that the Washington companies could get into Eastern Washington; then mills up in Eastern Washington were started, the Inland and the International and

they crowded the California mills out. Portland was the last place that the California mills could ship into as a dumping [120] ground. That was the reason why prices were so absolutely impossible to maintain because of the conflict between the dealers. The dealers were urging the cement companies to get together and maintain prices because every dealer has a hunch that he is a little better salesman on an even break than the other dealer. After the Washington mills came into existence the California mills up to a certain point continued going into Washington, and there was a fight between all the mills."

Upon cross-examination the witness further testified: "By dumping ground I mean that any California company that had a surplus would seek out a place of least resistance and sell it in at the best price they could get, without regard to the price they sold for and the territory where they manufactured it. We were urging the manufacturers to agree on some price which could be maintained so that the dealers would have the same price to sell it. This would have been advantageous to every dealer and to every consumer. A stable price. in my judgment, was to the interest of both dealers and consumers, and also to the interest of the manufacturer. Uniformity of rates in a commodity like cement is, in my judgment, as important as uniformity of rates in freight and to the benefit of the public at large. We used to hope that the manufacturers would get tired of the fight in price

and maintain a stable price. If both strong and weak manufacturers kept fighting prices the weak one would go to the wall, leaving the strong one. These letters dated January, 1916, offered in evidence show a difference in price at Seattle and Tacoma. This is due to the fact that they were still selling through [121] dealers in Tacoma, allowing a commission of 15 cents a barrel, and in Seattle were selling direct to the consumers. At times States and Counties were given a less price than the public at large. The desire of the dealers was to have a stable price at which they could sell and we wished the dealers made to resell at a certain price to prevent the dealers from giving away a part of their commission in order to effect a sale. In 1914 as far as I know the California companies had withdrawn from the Washington field. The fight in Washington was between the Washington mills, caused by the coming into the market of the Olympic mill. My idea was that when a settlement came between these mills if the California companies were in the market they would have to be considered. At the date of my letter, April 10, 1914, we were selling Superior cement and these people would not bill us cement to compete with the prices quoted by the dealers in Washington and Olympic cement, saying that the prices were below the prices they desired, so that we were practically out of the market as dealers and so that the Superior was not competing. in other words. In the letters dated January, 1916, (Testimony of Fred W. Harrington.) marked Exhibit 58, cement is quoted at 5 cents a barrel lower than in the letters of July 17, 1914, marked Exhibit 53. No, I am mistaken, the price in July, 1914, was 10 cents less than the price in January, 1916; the difference is in the commission and sacks."

Upon redirect examination the witness further testified: "In 1914 they allowed a reduction of 10 cents per sack; the price quoted in 1914 would make the net return to the factory \$1.75; the price in 1916 would make \$1.85 net to the factory and in Seattle the price was 25 [122] cents higher in 1916 than in 1914. The freight rate to Tacoma and Seattle was the same."

Testimony of A. A. Sutherland, for the Government.

Thereupon A. A. SUTHERLAND was called as a witness on behalf of the United States and testified as follows:

"I am treasurer and sales-manager of the Superior Portland Cement Company and live in Seattle. I have been in this business for ten or eleven years."

Thereupon the witness identified the letter written by him to Balfour-Guthrie & Co. of Portland, Oregon, dated October 5, 1914, marked Exhibit 59; and a letter written by him to one Hall at Eugene, Oregon, dated October 5, 1914, marked Exhibit 60; and a letter written by him to Gamble, general manager of the St. Paul & Tacoma Lumber Company at North Yakima, Washington, dated June

(Testimony of A. A. Sutherland.)

11, 1914, marked Exhibit 61; letter written by him to Foster & Co. at Hoquiam, Washington, marked Exhibit 62, and the same were offered in evidence and read to the jury over the objection and exception of the defendants on account of the date of said letters.

Upon cross-examination the witness testified: "The reason for the change at Aberdeen was that the account was not satisfactory. Payments were not proper and too much fault was found with prices. This was the trouble with Lebo. We consulted Balfour-Guthrie & Co. regarding Foster and the Washington mills regarding Foster because he was the only party in Hoquiam who handled cement and the only logical person to give it to."

Testimony of Cecil H. Bacon, for the Government.

Thereupon CECIL H. BACON was called as a witness on behalf of the United States and testified as follows:

"I live in Seattle and am at present manufacturing. In 1914 and 1915 I was secretary and treasurer of [123] Galbreath-Bacon & Co. and continued with them until January 1, 1918. They handled hay and grain and building material, including cement."

Thereupon the witness identified certain letters marked Exhibit 63 as letters received by Galbreath-Bacon & Co. and the same were offered in evidence and to said letters and to each of them the defendants objected upon the ground that they were written

prior to the formation of the Oregon Portland Cement Company, and upon the further ground that they related to the business of the Washington cement manufacturers in the state of Washington and did not relate at all to interstate business, but the Court overruled the objection and the defendants excepted and the exception was allowed and the said letters were read to the jury.

Thereupon the witness identified letter written by Fred R. Muhs to Galbreath-Bacon & Co. marked Exhibit 64 dated June 16, 1914 as one received by him in the regular course of business, and the same was offered in evidence and read to the jury over the objection of the defendants and their exception on account of the date of the same.

Thereupon the witness identified letter from the Olympic Portland Cement Company dated July 17, 1914, marked Exhibit 65, and the same was offered in evidence as having been received by the witness in the regular course of business and the same was offered and received in evidence and read to the jury.

Thereupon the witness identified certain papers as passing through their office in the regular course of business and the same were marked Exhibit 66 and introduced in evidence and read to the jury. [124]

Thereupon the witness identified certain papers as having passed through their office in the regular course of business and the same were marked Ex-

hibit 67 and introduced in evidence and read to the jury.

Thereupon the witness identified certain papers as having passed through their office in the regular course of business and the same were marked Exhibit 68 and the same were introduced in evidence and read to the jury.

Thereupon the witness identified a certain letter as having been received in the regular course of business and the same was marked Exhibit 69 and introduced in evidence and read to the jury.

Thereupon the witness identified a certain letter marked Exhibit 70 and the same was introduced in evidence and read to the jury.

Thereupon the witness identified a letter and the same was marked Exhibit 71 and was introduced in evidence and read to the jury.

Thereupon the witness identified a certain letter and the same was marked Exhibit 72 and the same was introduced in evidence and read to the jury.

Upon cross-examination the witness testified: "I don't know where the letter of March 1, 1916, referred to and the letter signed by Aman Moore is. I presume this letter came from the Portland office. I presume it was in our files and requisitioned by the Government. The Government had a special agent who went through our files and took what he wanted. I don't remember anything about the contents of the letter of March 1, 1916. It seemingly was a letter written by [125] me to the Oregon Portland Cement Company. It was written

about the same time that those letters were written in one of which I say that Coats had ditched me. The telegram of June, 1916, was sent to the Oregon Portland Cement Company at the instance of Mr. Aman Moore. He was in the office at the time it was sent. He saw it before it was sent. Mr. Aman Moore was in my office soon after the answer to that telegram came from someone in Portland. I did not know at the time why he asked me to send the telegram. I naturally would have supposed from the correspondence which I had with Aman Moore before that he would be the party to deal with. I knew nothing about his relationship with the Oregon Portland Cement Company. At the time we were seeking cement and willing to comply with his request to wire for a price. He didn't tell me any circumstances at all as far as I remember. The telegram would not have been sent if he hadn't called. I don't remember about his saying anything about having any trouble with his codirectors. He may have told me. I don't know anything about his business in Seattle. He took a copy of the telegram and also of the answer. In some of the telegrams reference is made to Blue Cross brand cement. It is the same as Santa Cruz cement. When I wrote that Coats had ditched us I meant that he would no longer supply us with cement to advantage."

Upon redirect examination the witness testified: "'When the telegram of June was sent at the suggestion of Mr. Moore I was seeking cement and if

I could have bought it would gladly have become a purchaser. I was seeking cement upon advantageous terms."

Upon recross-examination the witness testified: [126] "In the letter from Mr. Muhs to me dated June 16, 1914 there is a reference to some patents for some lime, rock and clay properties back of Everett. I was thinking of going into the business at a later date. I don't know what is meant in the letter by the California price standard. I had invited Mr. Muhs to come out sometime and see the property that we had and he said he would come. I was thinking about starting a cement plant myself."

Upon redirect examination the witness further testified: "I was seeking to buy cement at an advantageous price. We couldn't afford to buy the Oregon brand at the price quoted. If their cement had been O. K. and the price quoted had been under the cement market we would have bought from them. I was really trying to buy cement at a good figure."

Upon recross-examination the witness further testified: "I could only buy Oregon Portland cement or handle it if I could get it at a figure lower than that at which I could buy other cements in Seattle or Tacoma. The freight rates from the Washington plants to Seattle were lower than the rate from Portland to Seattle and if I got the cement from the Oregon Portland Cement Company and

not from the Washington mills it would have to be sold at the Oregon mill at a lower figure than the Washington mills were getting for it at their mills." [127]

Testimony of G. C. Nickerson, for the Government.

Thereupon G. C. NICKERSON was called as a witness on behalf of the United States and testified as follows:

"In 1914, 1915 and 1916 I was the manager of the branch office of the Washington Portland Cement Company in Portland, Oregon. Mr. A. F. Coats was the president of the company. I sold cement for them for about two years. The last part of the third year, 1916, I was not selling cement. quit before the Oregon Portland Cement Company began selling. I was notified January 1, 1916, to close up our contracts, notified by Mr. A. F. Coats, and from that time on we just finished up a few little contracts we had. While I was manager we didn't sell farther south than Salem. I have remained in Portland ever since 1916 but was not in the employment of Mr. Coats after 1916. know Mr. Clark M. Moore. I saw him in his office in the Wilcox building at the time that he received a telegram about the price of cement in Seattle. The telegram was from Galbreath-Bacon & Co. I believe, asking him to quote in Seattle. Mr. Clark M. Moore asked me what the price was and I told him I didn't know, that when I wanted to know I found out by asking them what their price was 128

(Testimony of G. C. Nickerson.)
in Seattle. I think Mr. Clark M. Moore phoned,
I suppose to Seattle. That is all that he said—I
do not know to whom he phoned."

On cross-examination the witness testified: was employed by the Washington Portland Cement Company in 1914, 1915 and 1916. Before that time I worked for the Henry Cowell Lime & Cement Company. Under Mr. Coats I had general charge of the business in Oregon. I had very little to do with any business in Washington; only in Washington at one place-Vancouver. About the first of [128] January, 1916 Mr. Coats notified me we would close up our present contracts. I think our market was limited to Salem on the south when I first went in the employ of the Washington Portland Cement Company. This company was in business here before I took charge. agent's name was Rochester. I paid no attention to any business in Washington except at Vancouver. I sold mostly in Portland, Astoria, Tillamook and along the Columbia River. I got my orders from Mr. Coats. When I was in Mr. Clark M. Moore's office I was merely calling on him in a friendly way and had no business with him. I didn't sell cement in Seattle and didn't know the price there nor care about it. I don't think we sold in Vancouver from Portland after I quit dealing in Oregon. When I quit the business was on the decline."

Testimony of John C. Eden, for the Government.

Thereupon JOHN C. EDEN was called as a witness on behalf of the United States and testified as follows:

"I am a manufacturer of Portland cement, I am president of the Superior Portland Cement Company, have been since its organization in 1907. The capitalization of the Company is two million dollars now. We acquired the Washington Portland Cement Company a year ago last December. That is the company of which Mr. Coats is president. I don't know what the capitalization of that company was. I think about a million and a half. I think I know all manufacturers of Portland cement on the Pacific Coast. I have frequently met them in San Francisco. At these meetings between 1914 and 1916 and at meetings held at other places there were discussions as to prices charged and territory served by the various mills. During the year 1914 there was quite a number of changes in prices, but I [129] do not recall any particular date upon which such changes took place. I remember a contract made by the International Cement Company at Spokane to supply cement for the interstate bridge. I think I am familiar with all the circumstances of that contract."

Thereupon the witness identified a letter dated April 18th and a letter dated April 24th attached to the same, together as Exhibit 74, and the same were offered in evidence. To the introduction of this evidence the defendants by their attorneys objected upon the ground that the letters antedate the

organization of the Oregon Portland Cement Company, and upon the further ground that the subject matter of the letters does not tend to sustain any allegation in the indictment and is incompetent and irrelevant. At the same time the witness identified a file pertaining to the interstate bridge cement contract and the same was offered in evidence marked Exhibit 75 and to this file the defendants duly made the same objection upon the same ground. Thereupon the court overruled the objections and the defendants excepted and the exception was allowed and the said exhibits 74 and 75 were introduced in evidence and read to the jury.

The witness further testified: "F. R. Muhs was the manager of the Standard and Santa Cruz Portland Cement Companies. They are California companies. W. P. Kinney, was then vice-president in charge of traffic of the Great Northern Railroad. At one time I was associated with the railroad. Mr. Skinner referred to in the telegram was then and now is traffic manager of the North Bank Railroad in Portland. I went to Delmonte, California and saw Mr. Hill and conferred with him about this rate mentioned in this correspondence. Mr. Calkins [130] was then traffic manager of the Chicago, Milwaukee & St. Paul. Kinney is the same Kinney I referred to a month ago. Mr. Woodworth was then vice-president and in charge of the traffic of the Northern Pacific. At that time I had the Chicago, Milwaukee & St. Paul, Great Northern and the Northern Pacific interested in this

matter. The words 'Engstrom wiring' have nothing to do with the interstate bridge; it relates to some other matter. A. A. Sutherland was and now is my sales-manager. He was a witness on the stand this morning. Gilman was at that time president of the North Bank Railroad in Portland. Alex Baillie is managing director of the Olympic Portland Cement Company, a member of the firm of Balfour-Guthrie & Company. They are managers for the Olympic Portland Cement Company. contract with the International to supply the cement for that bridge was assigned to our company. We paid nothing for the assignment—it was never considered. I have seen Exhibit 41 and wrote the answer indicated on the back of that exhibit. That letter does not refresh my memory in any respect. It contains merely the reason I gave him for not paying a commission that I didn't think he was entitled to. I know Clark M. Moore, have known him since January, 1914. I had a long distance talk with him over the phone in the month of June, 1916, in connection with a telegram that he said he had received from Galbreath-Bacon & Co., of Seattle in regard to the price of cement. He asked me if they were dealers and what our price was in Seattle. I don't recall what our price was."

Thereupon certain papers were identified by the witness, marked Exhibit 76 and offered in evidence. To these papers and to each of them the defendants objected [131] upon the ground that the papers had to do entirely with promotion work and were

irrelevant as they did not tend to show any allegations set forth in the indictment. The Court overruled the objection and an exception was allowed and the papers were received in evidence and read to the jury.

The witness further testified: "When I spoke of northern mills I meant Olympic Washington and Superior. They were the Washington companies."

On cross-examination the witness testified: "The letters passing between me and Mr. George relate to the Portland Cement Association, an association composed of all cement manufacturers in the United States and Canada. It had a constitution and bylaws; I have a copy of it."

Thereupon the witness produced the copy and the same was offered in evidence and marked Defendants' Exhibit 1 and read to the jury.

The witness further testified: "I was a member of the executive committee in 1914. I may have been a member of the committee for two years but I think for only one year. No, I was a member of the committee in 1916. Meetings of this association were held two or three of them in San Francisco, but usually in New York and Chicago. At the meetings held in San Francisco the matter of establishing a branch association in Portland was under discussion. Some of the member companies on the Pacific Coast objected to paying three-fourths of a cent a barrel and having all the money spent in National advertising. We felt that

most of the money to be contributed out here should be spent in our own [132] territory. I asked the general manager to call a meeting in San Francisco, for the purpose of discussing the establishment both of that and an engineer office in Portland. This meeting was called and held in the early part of April, 1916. Mr. Efleck was the president of the concern and Mr. Beck the general manager. Mr. Beck attended and not Efleck. Mr. Bristol of Salt Lake, Paddy Moran of Salt Lake, Mr. Clark M. Moore, Mr. Coats, the two Camerons, Fred Muhs and myself and Mr. Beck, the manager, attended that meeting. Mr. Clark M. Moore represented the Cement Securities Company of Colorado and Montana. At that meeting it was agreed to reduce the dues of the Coast members to half a cent a barrel and to spend at least one-half the money that was contributed in our own territory. I don't remember the exact percentage. There never was any meeting of the association where the question of sales was ever discussed and at no meeting that ever took place that I attended was there any discussion in regard to the territory in which cement should be sold. Mr. Clark M. Moore at that meeting represented the Boettcher interests. Mr. Butchart was not at that meeting. He was not a member of the association. I think his company came in about a year ago. The Oregon Portland Cement Company was not a member of the Association at that time. Letters passing between me and Mr. George were in connection with matters

which were under discussion at that meeting. The party mentioned in my letter to Mr. George had nothing to do with that meeting. There was a meeting about two months before April 18, 1916. It was probably a meeting to discuss the same matters. I was at that meeting. Mr. Clark M. Moore was not, nor was [133] Mr. Butchart. Mr. George was at the meeting if Al Coats wasn't there and Al Coats was there if Mr. George wasn't there. They never attended a meeting together. I don't recall what was done at that meeting, but do not recall that anything was done regarding territory or prices or the manner in which cement should be sold or where it should be sold. Mr. Beck was the manager of the association. Mr. George as well as myself was disgruntled and thought of leaving the association because of the manner in which the moneys we were contributing were being spent. We felt this money should be spent locally on the Coast here. There was no trouble between me and Mr. George or between any other members of the association in regard to any other matter. Some of us had threatened to withdraw from the Association and the real purpose of the meeting was to consider the advisability of a Coast association instead of a general association, but no Coast association was formed after that meeting. We had had one probably three years prior to that. Neither Mr. Butchart nor Mr. Clark M. Moore belonged to that Coast Association. Mr. George did. Prior to the correspondence regarding the bridge matter

there had been a meeting between the cement manufacturers and the railroads at which freight rates had been fixed and it had been agreed that these rates should not be changed without a discussion being first had. The proposed rate that they were putting in was to be put in without any discussion of it at all. This rate was a rate from a place called Irwin, a station on the Northern Pacific near Spokane. It was to cover Portland but my great concern was that it would also have to be duplicated to Seattle and Tacoma and that is why I fought [134] it so hard. From my knowledge of railroad business I knew that a rate could not possibly be in effect to Portland, the same distance, and not have the same rate to Seattle. It was not intended that the rate should apply eastbound, but only westbound and it was not to apply to intermediate points at all. At that time the rate applied only to Portland. The Milwaukee & St. Paul would have duplicated the rate and so would the Great Northern to Seattle. That has always been the practice. We were operating our plant about three months in the year at that time and with seven cement companies, including ours, competing for business and a small amount of business to go around I was naturally concerned about any move that would bring any more competition on our backs. The Eastern Washington companies were scrapping worse at that time than we did in 1914. They made up their minds as we did later on that if they kept it up they would

both go broke. I was never much interested in that connection in the Spokane company. Those mills were fighting all the time. The reason Irwin gave me for selling this cement to the Bridge Company was that the California fellows were invading their territory in Eastern Oregon and shipping cement up close to Spokane. The making the price to the Bridge Company was by way of reprisal for that. I don't know whether Oregon Portland Cement Company was organized at the time of this bridge fight or not. They were not selling cement at that time and I don't think they took any part in this fight. Neither Mr. Butchart or Mr. Clark M. Moore ever talked to me about this fight. Mr. Butchart never attended any meetings of the association or of the executive committee in San Francisco or elsewhere when I was present. I never [135] that I don't talk to meet a cement man him about general conditions in trade, but Mr. Butchart was never present when I talked about cement prices or anything else at any time or place. T have known him for 10 years. Until he became connected with the Oregon plant he never took any part in cement business that I know of on the Pacific Coast and after he became connected with the Oregon plant I know of nothing at all that he did with the business of cement manufacture and sale on this Coast. The letter from myself to Mr. Aman Moore dated March 26, 1916, refers to the promotion of concrete paving and has nothing to do with the cement business except the promotion of con-

crete pavement. It is the business of cement manufacturers to promote the use of cement. Our principal business is the sale of cement for road and street paving. The work done for promoting the use of cement by the Association consists of sending out men to convince people that concrete pavement is the best type and educating people to use cement in other things. Nothing ever came of it until very recently. The Association issued literature for the purpose of promoting the use of cement."

Thereupon the witness identified certain papers as publications of the Portland Cement Association, and the defendants offered, not the contents of these papers but the fact that such papers were issued, for the purpose of showing the character of the business done. Thereupon the United States objected to the introduction of the papers for any purpose as immaterial and incompetent and the court sustained the objection, and to this ruling the defendants excepted and the exception was allowed.

The witness further testified: [136] "The Association of which I speak was the Portland Cement Association, a National Association. I don't recall what I was doing in San Francisco at the time that Mr. George gave the party referred to in the correspondence. Whenever I go to San Francisco I call on all the cement men but I don't recall any meeting being had at that time, that is to say about two months prior to April 18, 1916. If there was a meeting at that time it was for the purpose of talk-

ing over promotion matters, concern paving matters, particularly in the State of Oregon. Nothing occurred at all if there was such a meeting in regard to the price of cement or the territory in which cement should be sold on this Coast or elsewhere. If there was a meeting at that time Mr. Butchart was not present nor Mr. Clark M. Moore. I don't know who was present at that meeting if there was a meeting about to months prior to April 18, 1916. I have not the letter dated April 15, 1916, from Mr. Aman Moore. I do not recall what it contained. Reading my letter I infer that it has to do entirely with the promotion of concrete in Portland and Oregon generally. This expression in my letter in which I say 'inasmuch as we will probably not participate in the cement tonnage in the State of Oregon' refers to the fact that we had made up our minds to withdraw from the State of Oregon and made it up on the starting of the plant at Oswego. My reason was that it would not be possible for me to market cement in Portland and which would be the largest market for the Oregon Portland Cement Company, right under the nose of their plant with only a switching charge to pay against my freight of 81/2 cents. Nothing was ever said between myself and Mr. Clark M. Moore or between myself [137] and Mr. Butchart or between myself and any representative of the Oregon Portland Cement Company which made me consider the advisability of giving up the Oregon market. It was my own notion that if I kept out of Oregon I might be left

alone in my own territory. My business in Oregon had always been very small and unprofitable. My company had a capital stock of two million dollars and a bonded debt of one million two hundred and fifty thousand dollars, a total capital of a little more than three million dollars. It was organized in 1907 and began to sell cement about the spring of 1908, largely west of the mountains in Washington, some in Oregon, but I don't think we came into Oregon until about 1910. We never shipped any cement to California. Until the Eastern Washington plants were put in operation we got as far east as Spokane. After these plants got into operation we have never attempted to go beyond the line where the freight rates meet-about Yakima, I think. In 1909 we marketed some cement in British Columbia. There was a shortage that year on the Coast except in Washington but we didn't market any cement in British Columbia after that year. We guit because the market wasn't profitable. There was a duty against us of about 60 cents a barrel and a dumping act which would have made it about as much more. We left the Eastern Oregon market as we were driven out by the new plants which had been erected for that territory and which could drive us out on account of their freight rates. I think in 1916 our freight rate to Portland was about 8½ cents a hundred, about 32 cents a barrel. Our freight rate to Seattle and Tacoma about 5 cents a barrel and I think the freight rate from Portland to Seattle and Tacoma was the [138]

same as from our place to Portland. North of Woodland our rate was lower than the rate of the Oregon mill. The freight rate on cement from California to Portland, Seattle and Tacoma ranged from \$1.00 to \$1.50 a ton, averaging about \$1.25 a This was the rate by water on tramp steam-I have never at any place either alone or with anyone else had any talk with Mr. Butchart or Mr. Clark M. Moore in regard to my withdrawing from the Portland market. I have never had any talk with Mr. Butchart or Mr. Clark M. Moore at any time or place nor with anyone when they were present or either of them were present in regard to the time when I would sell cement in Oregon, nor in regard to the interstate bridge matter. We were not interested at that time. I never had any talk with Mr. Butchart or Mr. Clark M. Moore at any time or place either when they were alone or in connection with anyone else in regard to the price at which the Oregon Portland Cement Company would sell the product of their mill either in Washington or in Oregon, nor whether they would go to Washington to sell cement there. They did go to Washington, however, and cut our prices there. All I know about the conversation over the phone with Mr. Clark M. Moore in June, 1916, is that he called me up to know the price of cement in Seattle. I do not know how it happened that he called me up, except the statement of Mr. Nickerson on the stand in this case. We always find out the price at which cement is selling in any market be-

fore we make a quotation in that market, and if Clark M. Moore didn't find out the price of cement in Seattle before he made a quotation there he should have had his head taken off. I know nothing about the inquiry coming from Galbreath-Bacon & Co. except that he asked me if they were dealers." [139]

Upon redirect examination the witness testified: "I always find out the prices in the market where I am selling or where I am going to sell. As a rule I do not quote a higher price if I expect to make a sale. I have never been able to get a higher price than the other fellow gets. I don't think I sold in Portland after the Oswego plant came in. This was in part on account of the disadvantage that I had in freight rates, but my principal reason was that I wanted to protect my own market by staying out of here, which I thought I could do. I continued to sell cement in Vancouver. The freight rate to Vancouver was the same as to Portland, but we had a little pride about selling cement any place in Washington regardless of what the freight rate was. There were two or three meetings of the Portland Cement Association in San Francisco, one of which was on the 11th of April, 1916. I cannot give the dates of the other meetings; they probably occurred both before and after April 11, 1916. There were probably five or six meetings in San Francisco every year, either of the Cement Association or general meetings, but of the Cement

Association there were very few; probably half a dozen altogether in the period of three years. There were other meetings that were not Association meetings that had to do with the same things as Association meetings. They were meetings in which we discussed matters of the promotion of concrete pavement and the additional uses of cement in other lines. I think that there were as many of such meetings as of Association meetings. April 11th is the only date that I can give of any Association meeting. Mr. Butchart took no part in the cement business on the Coast until after the Oregon Portland Cement Company came in,—I should say [140] took no part in the business south of the border. He had a plant about 150 miles across the Canadian border from Seattle and about the same distance from our plant. I don't know anything about his being a stockholder in the Washington Portland Cement Company. We bought the property but not the stock and I don't know who were the stockholders. I was one of the defendants in this case."

Upon recross-examination the witness further testified: "I never met Mr. Butchart or Mr. Clark M. Moore at any meetings in San Francisco which were not association meetings or at any association meetings. I think at meetings which were not association meetings we discussed prices at which cement should be sold. At none of these meetings was there ever present any representative of the

Oregon Portland Cement Company. When I find out what the market price of cement is at any place I wouldn't expect to sell our cement at that place at a higher price than any other manufacturer. It is pretty hard to say what the market price of cement is, whether the actual price at which it is sold or whether the price the Company sent out sometimes in the way of circulars. I should say the market price would be the price at which cement is actually being sold, and when I spoke of the market price at Seattle I meant the price at which Washington companies were selling cement in that territory; that is the price which I gave Mr. Clark M. Moore. At the time that I talked with him I think the list price was being adhered to pretty firmly. There was usually a price at which cement companies were selling which I called the market price. This price was established a couple of years before that by an announcement [141] which I made to the other companies that we were going to get a price of \$1.90 net of sacks or close up our plant and keep it closed. We couldn't survive under the prices which we had ben getting for five or six months previous to that time. This announcement was made over the telephone to Mr. Coats and probably to Mr. Cameron. I made that announcement in the hope that they would follow me because if we continued to sell at the rate at which we were going at that time we couldn't have lasted financially more than two or three

(Testimony of John C. Eden.)
weeks longer. Cement was being sold at a material loss.''

Upon redirect examination the witnes testified: "I have seen Mr. Butchart in San Francisco, but not in the year 1916. I think it was two or three years prior to that time, about the time that he first became connected with the Oregon mill. I met Clark M. Moore in San Francisco at that association meeting. That was the meeting of the Portland Cement Association and had nothing to do with the fights touching the interstate bridge contract."

Upon recross-examination the witness further testified: "My attention is called to some correspondence between me and Mr. Muhs regarding a telegram. I would say that in addition to the Association we have a little association, for instance on the Coast all of the manufacturers on the Coast contribute to a fund to promote particularly concrete pavement or any kind of work that consumes cement. In addition to this three-fourths of a cent which we paid to the Association we contributed two or three or four cents a barrel to take care of local [142] promotion, and I think the principal activity of this local promotion is the inspection of pavement, our experience being that the average contractor will steal cement on us, the pavement will go to pieces and concrete pavement is discredited on account of it. So we probably spend four-fifths of our secondary contribution for the inspection of concrete pavements as it is being

(Testimony of John C. Eden.)

laid. This correspondence had reference to that. A contractor who had taken a contract in Tillamook had the reputation of being crooked and I wanted to warn Mr. Muhs against him. Our fight was particularly warm in Oregon. The Warren Brothers were doing everything they could do to discredit the concrete type of pavement and I wanted to put Mr. Muhs on his guard. Generally speaking we never can get a competent man at the price the city or county is able to pay, so we generally had one of our men designated and if we could get him and if the county would pay \$75.00 and the man demanded \$150.00 we would pay the other \$75.00 in order to get a competent man to inspect the work and see that the specifications were followed. We didn't take contracts ourselves. We wanted to see that the specifications were properly carried out. Mr. Muhs' letter is on the same subject and he suggests that the inspector should be furnished by the Association. That is a part of what we call our promotion campaign. We feel if we lay good pavement we will be able to lay another one."

Upon redirect examination the witness testified: "I had a copy of the constitution of the Portland Cement Association because I was asked some question about it on the last trial. I brought it entirely on my own motion." [143]

Testimony of W. P. Cameron, for the Government.

Thereupon W. P. CAMERON was called as a witness for the United States and testified as follows:

"I represent Balfour-Guthrie & Company of Seattle, agents and managers of the Olympic Portland Cement Company, and have done so since the factory started in June, 1913. The Olympic Portland Cement Company has no offices in this country at all with the exception of Balfour-Guthrie & Company who are agents and general managers. The affairs of this corporation are entirely in the hands of Balfour-Guthrie & Company of Seattle and Balfour-Guthrie & Company of Portland has nothing to do with this Company. We did sell Olympic cement in the state of Oregon but withdrew from Oregon or decided to withdraw in the beginning of 1916. Prior to that time we restricted our territory in Oregon in 1914 to Salem on the south. This was discussed with the Superior and Washington companies and was a matter of controversy with the northern California mills. I was in San Francisco in January, 1916 and again in April, 1916. I saw Mr. Butchart in San Francisco in April, 1916. I met Clark M. Moore there at that time. I know Mr. C. T. W. Hollister,—I have known him since about that time. I think I heard that he had been made sales-agent or traveling agent for the Oregon Portland Cement Company, and my recollection is that some of the dealers in southwestern

Washington had told me that he was canvassing that territory for cement business. This matter was probably mentioned at some of the meetings between myself, Mr. Coats and Mr. Eden. I think this information came to me before I saw Mr. Butchart in San Francisco. I mentioned it to Mr. Butchart that I heard that the Oregon company was soliciting business in southwestern Washington and I inquired if it was the policy [144] of that Company to continue soliciting business in that territory."

Thereupon a letter, dated August 4, 1916, marked Exhibit 78 and certain other papers marked Exhibit 79, were identified by the witness and offered in evidence by the United States, and to this letter and these papers the defendants objected upon the ground that the same are not competent or not relevant as they relate entirely to business within the state of Washington and not to interstate commerce, but the court overruled the objection and the defendants excepted and the exception was allowed and the said exhibits were introduced in evidence and read to the jury.

Upon cross-examination the witness further testified: "The Olympic Portland Cement Company is a corporation organized in London and has no offices in this country but is run by Balfour-Guthrie & Company of Seattle as agents. It started in business in June, 1913. I think I was in San Francisco in April, 1916 and met Mr. Butchart there.

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(Testimony of W. P. Cameron.)

I was down at the Association meeting about which Mr. Eden testified and it was a meeting of the Portland Cement Association, the national association. It was at that time that I met Mr. Butchart. He did not attend that meeting. In so far as I am aware he was not a member of the Association at all. I never did attend any meeting with Mr. Butchart. I never saw him at any meeting. Mr. Clark M. Moore attended that meeting, representing the Cement Securities Company of Denver. That Association has a constitution and by-laws which have been offered in evidence and read. I think we joined that Association about 1915. I was in San Francisco in January, 1916 upon other business [145] for the firm of Balfour-Guthrie & Company. I was not there for any conference with other cement manufacturers but I called upon the representatives of all the cement manufacturers I believe. To my recollection there was no meeting of the Cement Association at that time. As far as I remember there was a general discussion about the best way to go about promoting the use and sale of cement and finding avenues for consumption of it, principally with the idea of promoting good road paving. There was no discussion at any meeting in regard to the territory in which any company should sell cement or the prices at which it should be sold and these matters never came before any Association meeting. I saw Mr. Butchart at the Palace Hotel, met him casually. I don't think I had any talk with him further than I have

said and I never met him at any meeting of the Association or at any meeting of cement people in California or elsewhere. I never met Mr. Clark M. Moore at any meeting other than the Association meeting in April, 1916. I had no talk with him at that time. I did not know that he was to have any connection with the Oregon Portland Cement Company. Neither at that meeting nor at any other meeting was there any discussion of the affairs of the Oregon Portland Cement Company. I think it was in 1914 that we limited our territory in Oregon to Salem and points north of Salem. Mr. Butchart had nothing to do with this nor did Mr. Clark M. Moore, nor did the Oregon Portland Cement Company or any of its officers. This limitation of territory was the result of a controversy between the western Washington mills and the northern California mills. The northern California mills thought we should stay north of Salem and I know practically forced [146] us to do so. We decided to withdraw from doing business in Oregon in the beginning of 1916. This was largely the result of more threats on the part of the northern California mills. Neither Mr. Butchart nor Mr. Clark M. Moore or the Oregon Portland Cement Company had anything to do with this. I met Mr. Hollister many years ago when he was selling Ideal cement manufactured in Denver or some place in Colorado. I may have been mistaken about Hollister having personally canvassed southwestern Washington. This may have been done by

mail but I think it was done before I met Mr. Butchart in San Francisco in April, 1916. Mr. Butchart talked as if he didn't know anything about it and was entirely noncommittal-made no statement one way or the other. While we were in business in Oregon our business was probably 20% of our total tonnage. It never was very profitable. We sold through Balfour-Guthrie & Company of Portland. I never had any talk with Mr. Butchart at any time in regard to this division of territory in Oregon nor did I have any talk with Mr. Clark M. Moore of this character. I never had any talk with Mr. Butchart or with Mr. Clark M. Moore about our withdrawing from Oregon. In talking with other manufacturers, Washington or California, the fact that the Oregon Company was going to start up may have been discussed but that was as far as anything was said. Nothing was said in regard to the territory in which or the prices at which the Oregon Company should sell its product. Neither Mr. Butchart nor Mr. Clark M. Moore or the Oregon Portland Cement Company had anything to do with the letters passing between us and Foster & Company. There was an understanding about this between ourselves, the Superior and the Washington mills but with nobody else. We had had [147] an agent at Grays Harbor named Lebo & Company who had proved unsatisfactory and when we got an opportunity to get Foster & Company we were glad to have them as Balfour-Guthrie & Company did lots of other

business selling fire brick and salt and all kinds of stuff like that to Foster & Company. The capital stock of our Company is \$1,200,000.00 in stock and \$600,000.00 in bonds, the capacity of our mill about 2000 barrels a day. It has not been increased since it was built. We have sold entirely in western Washington except during the period that we were selling in Oregon. We never have sold in California and we sold in Oregon only in western Oregon, never sold in British Columbia; sold in eastern Washington as far as Yakima and Wenatchee. Beyond those points the freights were in favor of the eastern Washington mills. Freights affect the market in this way. We set our price at our mill for our cement and when the freight rates will permit us to sell at a point carrying a certain rate from our mill we sell and if we can't go any further we have to stop. This rule is true of the cement business generally."

On redirect examination the wtiness further testified:

"During 1916 we delivered cement in Portland to take care of our orders and commitments but did not do any new business. We merely fulfilled existing contracts and commitments. We sold a little in Vancouver, Washington and have continued to sell there ever since."

Testimony of T. J. Elliott, for the Government.

Thereupon T. J. ELLIOTT was called as a witness for the United States and testified as follows:

"I reside in Auburn, Washington, am in the hardware business. We used to handle building material in [148] the way of cement and stuff like that, sash and doors—we handle sash and doors still. I wrote a couple letters to the Oregon Portland Cement Company about cement in 1916 I believe; I did not buy from them."

Thereupon certain papers were identified by the witness, the same relating to correspondence between the witness and the Oregon Portland Cement Company at the time that Mr. Aman Moore was vice-president and treasurer, it being understood that the letters from the Oregon Portland Cement Company were signed by Aman Moore. The said papers were marked Exhibit 80 and introduced in evidence and read to the jury.

Upon cross-examination this witness testified: "Auburn is about 20 miles south of Seattle, between Seattle and Tacoma. This correspondence, Exhibit 80, is all I have had to do with the Oregon Portland Cement Company. Somebody gave me the address,—I don't know who did. I don't know the freight rate from Portland to Auburn; it must be higher than the freight rate from Seattle to Auburn. We buy some goods from Portland on a local freight rate. The rate is about 35 cents a 'undred on hardware from Portland to Auburn and

(Testimony of T. J. Elliott.)

about 20 cents from Seattle to Auburn on hardware. In 1915 we handled probably four or five cars of cement, handled none in 1916 and have handled none since. The price didn't suit me and we weren't prepared to handle it and just cut it out."

Testimony of J. A. Pooler, for the Government.

Thereupon J. A. POOLER was called as a witness on behalf of the United States and testified as follows:

"I have been in the cement manufacturing business, that is to say, manufacturing not cement but pipe and tile, building blocks and road pipe reinforcing and have been [149] selling cement. We use cement for this kind of work. I have been in business at Salem since 1910. In 1914, 1915 and 1916 I got my cement from the Santa Cruz Cement Company. I have dealt with them exclusively. Riverside cement was sold at one time in Salem, I think not since 1914. The Washington cement companies sold cement in Salem in 1914 and before that time. The agent for the Oregon Portland Cement Company called on me but I didn't buy cement. He quoted the same price at which I was buying from the California company."

Thereupon the witness identified a letter marked Exhibit 81 and the same was introduced in evidence and read to the jury.

The witness further testified: "I have never bought any Oregon cement."

(Testimony of J. A. Pooler.)

Upon cross-examination the witness further testified: "This letter, Exhibit 81, gave 5 cents discount provided the bill was paid within ten days after shipment. Prior to that time the discount had been 1%. It raised the discount. I do not remember the several prices made to me; could not without looking at my books. I was charged so much for sacks and the amount allowed when the sacks were returned. I have done business exclusively in cement with the Santa Cruz since 1912, had the agency for the City of Salem for Santa Cruz cement. I was a dealer but they furnished cement to no other person in the city but me. I had this contract when the Oregon Portland Cement Company started in. I guess all the agents of the Oregon Portland Cement Company have called on me, sometimes once a month and sometimes every two or three months. They have wanted to sell me cement but I didn't want to make any [150] change."

On redirect examination the witness testified: "I get my cement in carload lots from Portland or California; most of it from Portland, some of it comes from California. When it comes from Portland it comes to Portland by boat, is loaded on cars and hauled to Salem. The Oregon company tried to get my business. They made the same price but no lower price than the California company."

Testimony of A. W. Fisher, for the Government.

Thereupon A. W. FISHER was called at a witness on behalf of the United States and testified as follows:

"I live in Corvallis, Oregon; am in the flouring mill business, have dealt in cement for ten or twelve years. Prior to 1916 I got my cement from the Mt. Diablo people, a California company. I have bought from nearly all the companies that were in the market in Portland when I could not get the Mt. Diablo. I used other brands-Golden Gate, Oregon and some Washington. Golden Gate is a California cement. The Mt. Diablo plant-I don't know its exact location; I understand it is near Los Angeles. The Golden Gate plant is north of San Francisco. In May, June and July, 1916 I got some Mt. Diablo and some Golden Gate. I think I got the first carload that was shipped out from the Oregon plant. The price was about the same as that quoted to me on the California cement. There may have been a little better discount to get the cement introduced. I get my cement in carload lots. When it came from California it sometimes came direct by rail from California, was switched off at Albany, and sometimes came by rail from Portland."

Upon cross-examination the witness testified: "I think it was in June, 1916, that I got the first cement from the Oregon Portland Cement Company. I bought a [151] great deal of cement from them.

(Testimony of A. W. Fisher.)

I wanted to buy from them as I thought I should give an Oregon product what business I could. I think they gave me a 5% better discount than the other companies. The Oregon Company solicited my business, Mr. Hollister called on me.

Testimony of Aman Moore, for the Government.

Thereupon the United States called as a witness AMAN MOORE, who testified as follows:

"I live in Los Angeles; am a cement manufacturer. I started in the cement business in 1887 and have been in it continually since that time. I have known Mr. Boettcher since about 1900; was in business with him from about 1900 until about the first of 1906. During this time I was general manager of the Colorado Portland Cement Company, at that time known as the Portland Cement Company, of which he was president. He is also president of the Cement Securities Company, a holding company which controls the stock of the Colorado company, the Devils Slide plant in Utah, the Three Forks plant in Montana and several other companies. I first became interested in the plant now known as the Oregon Portland Cement Company's plant at Oswego in February, 1909. I first met Mr. R. P. Butchart in the latter part of 1910. The Oregon Portland Cement plant started a few weeks prior to June 6, 1916 and made its first shipment on June 6, 1916. I had had correspondence with Mr. Butchart before that time on the situation of the Oregon Portland cement plant."

Thereupon the witness identified a letter written by R. P. Butchart to the witness and a carbon copy of a letter attached written by said Butchart to Mr. Boettcher, and the same were offered in evidence as Exhibit 82 and introduced in evidence over the objection of the defendants [152] on account of the date thereof and their exception and was read to the jury.

Thereupon the witness identified a letter written by R. P. Butchart to the witness, marked Exhibit 83, and the same was introduced in evidence over the objection and exception of the defendants on account of its date and read to the jury.

Thereupon the witness identified a letter marked Exhibit 84 written by R. P. Butchart to the witness and the same was introduced in evidence over the objection and exception of the defendants on account of its date and read to the jury.

Thereupon the witness identified a letter written by R. P. Butchart to the witness marked Exhibit 85, and the same was offered and introduced in evidence over the objection and exception of the defendants on account of its date and read to the jury.

The witness further testified: "Mr. Coats mentioned in this letter was then president of the Washington Portland Cement Company."

Thereupon the witness identified a letter written by R. P. Butchart and also a copy of a telegram sent by the witness to R. P. Butchart, and the same was marked Exhibit 86 and offered and introduced in evidence and read to the jury.

Thereupon the witness identified carbon copy of a letter written by the witness to R. P. Butchart, marked Exhibit 87 and the same was introduced in evidence over the objection of the defendants and their exception on account of its date and read to the jury.

Thereupon the witness identified a letter written [153] by R. P. Butchart to the witness marked Exhibit 88 and the same was introduced in evidence and read to the jury.

Thereupon the witness identified a carbon copy of a letter written by the witness to R. P. Butchart marked Exhibit 89 and the same was offered in evidence and objected to by the defendants upon the ground that the same was incompetent and irrelevant and does not tend to sustain any of the allegations of the indictment or any guilt on the part of the defendants, but the objection was overruled and an exception taken and allowed and the letter was introduced in evidence and read to the jury.

Thereupon the witness identified a letter received by him from R. P. Butchart marked Exhibit 90, and the same was offered and introduced in evidence and read to the jury.

Thereupon the witness identified a carbon copy of a letter written by him to Mr. R. P. Butchart, marked Exhibit 91, and the same was introduced in evidence and read to the jury.

Thereupon the witness identified a letter received by him from R. P. Butchart, marked Exhibit 92.

and the same was introduced in evidence and read to the jury.

Thereupon the witness identified a letter received by him from R. P. Butchart, marked Exhibit 93, and the same was introduced in evidence and read to the jury.

Thereupon the witness identified a letter received by him from R. P. Butchart, marked Exhibit 94, and the same was introduced in evidence and read to the jury.

Thereupon the witness identified a carbon copy of a letter written by him to R. P. Butchart marked Exhibit 95, and the same was introduced in evidence and read to the jury. [154]

Thereupon the witness identified a letter received by him from R. P. Butchart, marked Exhibit 96, and the same was introduced in evidence and read to the jury.

Thereupon the witness identified a letter received by him from R. P. Butchart, and a carbon copy of a letter attached thereto as having been received at the same time, and the same was marked Exhibit 97, and was introduced in evidence and read to the jury.

Thereupon the witness identified carbon copy of a letter written to L. C. Newlands, marked Exhibit 98, and the same was introduced in evidence and read to the jury.

The witness further testified: "Mr. Butchart arrived in Portland April 11, 1916. Shortly after his arrival I talked with him in regard to his

reason for being displeased with Mr. Hollister's soliciting business for the Oregon Portland Cement Company. He said they had a meeting in San Francisco during the week of March 17th to 25th, and the Washington manufacturers and the California manufacturers were present, and they had agreed to limit the territory of the Oregon company. They were not to ship east of Central Oregon, they were to ship into Central Oregon, but not east of Umatilla. Mr. Butchart said that Mr. Rogers of Spokane of the Mettaline Falls Company had made a bitter protest about Mr. Hollister invading the Spokane territory by quoting Walla Walla, Pendleton and Baker. In other words, he quoted beyond Umatilla, the point where the Oregon Company was to participate, and that I had committed the great offense of having the freight rates reduced so we could ship in there. I was soliciting business for the Company, it was only in that particular territory [155] where Hollister had been soliciting business, the territory outside of where the Oregon Company was to go dubiness. I was sales manager up to April 14, 1916, when I was replaced by Mr. Clark M. Moore; about 3 days after Mr. Butchart returned from California. While sales manager, I sent out a circular letter in January, 1916, throughout Oregon and Washington as far as Seattle, the Hawaiian Islands and Alaska."

Thereupon the witness identified this circular letter dated January 27, 1916, and the same was

introduced in evidence, marked Exhibit 99 and read to the jury.

The witness further testified: "I received over one hundred replies from the Trade. I had a conversation with Mr. Clark M. Moore either the day prior to or on the same day on which he was elected sales manager. I turned these replies over to him, that is the carbon copies of the answers together with the inquiries. This is a carbon copy of one of the replies which came."

The same was introduced in evidence, marked Exhibit 100 and read to the jury.

"And this is a carbon copy of another of the answers which came."

The same was introduced in evidence marked Exhibit 101 and read to the jury.

"And this is another one of the inquiries which came in response to my circular, and a carbon copy of my answer to the same."

The same was introduced in evidence, marked Exhibit 102 and read to the jury.

"After I called Mr. Clark M. Moore's attention [156] to these various replies I had a discussion with him as to the arrangement made by Mr. Butchart in San Francisco in regard to price and territory. I asked him if he intended to carry out that agreement and he gave me his promise and absolute oath that he would not. That occurred on the morning before he was elected sales manager, I think. In this conversation I told Mr. Clark M. Moore of the agreement which had been

made whereby our territory was restricted by the Columbia River on the north, Umatilla on the east and some point around Roseburg on the south, although we had our freight rates arranged so we could ship as far north as Olympia, Huntington and surrounding territory. We also discussed the removal of Mr. Hollister from the Sales Department and Mr. Butchart's direction about it because Mr. Hollister had been soliciting business for our Company in the State of Washington. We discussed the whole situation and everything pertaining to the combine, the matters of these inquiries and especially those about the territory which we were not supposed to ship or quote. We had one conversation two days later along the same line. On the 16th of April I invited him and his brother Joe out to my home at Oswego for dinner and there I received not only his promise but his oath—I received his oath on the square that he would not carry out the combine. I had the first conversation with Mr. Butchart about the combine after he returned from California, at the Portland Hotel or at the Cement office in Oswego. I think I came in first and called on him at the Hotel and we had a talk and later he came out to the factory. I had a talk with him about the reasons for my removal as sales manager and the substitution of Mr. Clark M. Moore. He related all the details of the meeting in California, [157] said that Mr. Rogers had come down from Spokane and complained of our having the freight rates changed and sending

Hollister to Eastern Oregon. Mr. Henderson of the Pacific Portland and Mr. Coats of the Washington Portland had said that I was persona non grata as sales manager and insisted that I be removed; that Mr. Rogers had suggested Clark M. Moore and had met with the approval of all. The business of the Oregon Portland Cement Company was conducted absolutely in compliance with the agreement entered into there by Mr. Butchart, that is until a later date when I started to make trouble for them and then to cover it up they started to change their program;—that was a month or two later. Mr. Clark M. Moore and myself are not in any way related."

Upon cross-examination the witness further testified: "I was first engaged in the cement business in 1887 as office boy of the Buckeye Portland Cement Company in Bellfontaine, Ohio, and a few months later went into the laboratory. I had nothing to do with the construction of that plant. I was with that company in various capacities until I became superintendent of it in 1895. Afterward I traveled for it in the summer months while I attended college, and finally went West, and in the fall of 1898 severed my connection with the Buckeye Company. I first became acquainted with Mr. Boettcher about 1900. He was president of a bank at Denver, had just moved from Leadville to Denver. He wasn't at the head of the Colorado Cement companies at the beginning. From 1898 to 1900 this company was headed by William Geddes, 164

(Testimony of Aman Moore.)

a Denver bank crowd. The new plant was built in 1900 and at that time Mr. Boettcher came in and afterward became president of it. I testified upon the former trial of this case here, but [158] did not state in my testimony that I started the Buckeye Portland Cement Company at Bellfontaine, Ohio, in 1887. I have examined the record of my testimony which is shown to me. I started work for the Buckeye—part of my testimony is left out no doubt. I built the first plant in 1898 and 1899 for the Colorado Portland Cement Company and later I built the present plant which is still operating. I first met Mr. Butchart in the fall of 1910 or the spring of 1911-I think the fall of 1910. He was then managing director of the Vancouver Portland Cement Company at Tod Inlet, British Columbia. I first became connected with the Oregon Portland Cement Company about August 15, 1915. It succeeded the Portland Cement Company which has been previously incorporated and succeeds to the rights and properties of the Portland Cement Company. The Portland Cement Company was organized in the early spring of 1909. It succeeded to the rights of the company formed by Mr. Nibley of Utah. I think it was called the Utah Oregon Cement Company or the Oregon Utah. I guess this company was incorporated but no properties were ever transferred to it and no moneys accepted by it. Mr. Boettcher was interested in the Portland Cement Company. He became connected in the early spring of 1911

by subscribing for a certain amount of bonds and stocks upon my invitation that he join us. At that time I knew of Mr. Boettcher's connection with the Colorado companies. Mr. Boettcher became connected with the Portland Cement Company, the original company here, I think in the late fall of 1910. He was a stock and bondholder. I do not know whether he was a director or not. I think he was. He became interested at my invitation and solicitation and at that time I knew [159] of his connection with the cement industry at Tod Inlet. Dr. Smith was the first president of Oregon Portland Cement Company. I don't recall who were the vice-presidents. I think I was secretary and general manager. I don't think I was vice-president. The first organization was a temporary organization on account of the company being organized in the State of Nevada. We used dummy directors and Mr. Butchart first became an officer of the company on December 21, 1915. He was not on the executive committee or director prior to that time but he took it upon himself and carried the entire force of the company. Prior to December 21, 1915, the management and control of the company was under me. The affairs were still conducted under the management of the old company which had not been dissolved and its properties had not been transferred, and I was president of the old company and as such proceeded to finish the plant before the new company acquired the property. There was an

executive committee of the old company. We had an executive committee and a board of directors. The new company didn't function or attempt to do any business until December 21, 1915. My attention being called to Plaintiff's Exhibit 82 I will say that I haven't a copy of the letter to which this letter is in answer, nor any letters. I turned them all over to the District Attorney's office. I can't recall even after reading Exhibit 82 whether in my letter of September 14, 1914 there was any reference to prices, territory or any other matter in connection with selling cement by the new company. The new company was not organized until August, 1915. In September, 1914 the old company was standing statu quo. There was a plant, work had been [160] stopped and we were completing the financing. The old company may have been dissolved by a proclamation for failure to pay its license taxes. It was later reinstated. At the time the letter of September, 1914, was written the old company had probably been dissolved by proclamation of the Governor. Exhibit 83, dated May 12, 1915, was written prior to the organization of the new company. At that time the properties were held by the old company but it may have been in bad standing on account of not paying its taxes. In this letter reference is made to some conversation that I had about the California price of \$1.50 delivered on the road. I never made any such statement to the County Commissioners in Portland. I remember the in-

cident referred to in this letter. I discussed the matter of the price of \$1.50 at the mill for road work in California. This was at a public meeting at the County Court House in this County. I had a talk with Mr. Coats in connection with that price about that time. Mr. Hunt mentioned in the letter with reference to sacks is Lee Hunt of the Hunt Engineering Company of Kansas City. About that time I made an address to the County Commissioners or rather an informal talk. I recognize the letter which you show me as the letter which I wrote to Mr. Butchart on May 16, 1915. I recognize Exhibit 84, letter from Mr. Butchart to me dated May 16, 1915 which refers to letter from me dated May 13, 1915. I wish at this time to correct one statement which I made. I said the new company didn't function until December 21, 1915. It was December 21, 1915, when Mr. Butchart was elected president. The company started to function from the time on which the property was transferred which was sometime before that date. I cannot fixe the exact [161] date but it was between August 15th and December 21st. This letter which you show me dated May 13, 1915, is 'a letter which I wrote to Mr. Butchart."

The letter was thereupon offered in evidence marked Defendant's Exhibit 2 and read to the jury.

"Exhibit 85, a letter of May 22d refers to my letters of May 16 and 17, 1915. I recognize these letters as my letters of May 16 and 17, 1915."

The said letters were then offered in evidence, marked Defendant's Exhibits 3 and 4 respectively and read to the jury.

"I recognize this letter book and a letter written by me copied therein dated June 9th. It is the same letter referred to by Mr. Butchart in his letter of June 14, Exhibit 86. I will not attempt to connect it up with the other letters."

The letter of June 9th was thereupon introduced in evidence marked Defendant's Exhibit 5.

At the time that the question of the Moran bid came up and when I addressed the County Commissioners in May, I intended to have Mr. Butchart furnish cement for these jobs from his mill at Tod Inlet or arrange with the Washington Portland Cement Company until such time as our plant was completed. At that time the present Oregon Company was not incorporated. I was having some difficulty in realizing on subscriptions and winding up collecting the final subscriptions. The final subscription collected was Mr. Boettcher's which was collected in the early part of August, 1915, and thereupon I immediately incorporated the Oregon Portland Cement Company. The correspondence shows that all acts performed by me were [162] to the approval of and under the instructions of Mr. Butchart. I was merely acting in the capacity of subordinate. All the correspondence conferring with him about the price, the refusal of him to permit me to quote \$1.75, in fact everything in the letters shows clearly that I was acting as a subordinate

under Mr. Butchart and taking his orders specifically. He assumed the responsibility. He was not president but it was generally understood that he was to become president of the company and the subscriptions were all made conditional upon Mr. Boettcher or Mr. Butchart taking the presidency of the company, and later it was decided that Mr. Butchart should act as president. I cannot say at what time this decision was made. I was president of the old company at that time and no new company had then been formed. Nobody instructed me to consult with or obey Mr. Butchart's orders but I was dependent upon Mr. Butchart to carry out his commitments. Everybody else had paid up but him. I didn't care to do anything to offend him or to annul or prevent his paying up his subscription. The entire reorganization depended upon it. At that time neither Mr. Butchart nor Mr. Boettcher had paid up. They had promised to pay nearly three years before. I didn't consult with Mr. Boettcher about these sales matters or about what prices should be made. He was too far away. Mr. Coats mentioned in my letter of June 9th and whom I met at the Benson Hotel in connection with Mr. Eden and Mr. Moran, was president of the Washington Portland Cement Company, and Mr. Eden was president of the Superior Portland Cement Company. The occasion for the notification to Mr. Butchart about the dinner with Mr. Coats and Mr. Eden and Mr. Moran and that the agreement with reference [163] to the \$1.75 price and that no

other contractor would have a lower price, came from Mr. Eden and Mr. Coats, was that Mr. Butchart had instructed me not to do anything without conferring with Mr. Coats in the matter and to make no price. This instruction was in writing. It is somewhere in the correspondence. In Exhibit 85, among other places, Mr. Butchart states: "In fact I would leave Mr. Nickerson severely alone and anything of importance you can take up with Mr. Coats." There was still further correspondence referring to this same matter. At the time I asked for these bids Mr. Butchart could fill the order either from his mill in British Columbia or from the Washington mill in which he was a director and stockholder at that time. I should not say he was a director; he was a stockholder and I supposed that we would fill these orders or contracts in part from either Mr. Butchart's mill in Canada or from the Washington mill of which Mr. Coats was president. The construction of this paving would take a year or two. We expected to have the plant running within six months and we then would be in shape to fill the orders from the Oswego mill. Mr. Butchart had agreed to limit the sale of the Oregon mill to central Oregon, including branch lines from the O. R. & N. in Oregon. The point would be somewhere about Heppner or Umatilla. The territory was bounded on the north by the Columbia River, on the east by about Umatilla I should say, and on the south by some point in the vicinity of Roseburg. On the former trial I did not say anything about the

territory being bounded by the Willamette River. I did say bounded by the Columbia River on the north, the Des Chutes River on the east and a point about Drain on the south. Drain is [164] in the vicinity of Roseburg. You will find also in my testimony upon the former trial that I said something about in the vicinity of Umatilla. At the former trial of this case I did say that in my conversation with Mr. Butchart he said the limit was about the Willamette River and the Des Chutes River on the east, the Columbia River on the north, the Des Chutes River on the east and a point about Drain on the south. As to the points fixed by Mr. Butchart in that conversation, the Des Chutes River or Umatilla as an eastern point I would say they are a few miles apart so it doesn't make any difference except there are two more branch lines going into central Oregon beyond the Des Chutes where the Oregon company was to sell. Mr. Butchart said we were to sell in central Oregon. He did not fix the exact town. He said we were to sell central Oregon and sell south, north of Roseburg and north of the Columbia River. We were not to ship into Washington. The testimony which I gave on the former trial in which the point was fixed as Des Chutes is approximately correct. A matter of a few miles wouldn't make any difference. I guess it is 20 or 30 miles from the Des Chutes River to Umatilla. The Washington companies withdrew from the Oregon market in the early part of 1916 after Mr. Butchart meeting them in Seattle the

first or second day of January leaving east to Toronto. They took steps to withdraw immediately thereafter. Mr. Butchart returned to Portland from the California trip on April 11, 1916. I had a conversation with him the following morning, several conversations, some at the Portland Hotel, some out at the plant in my office and one at the Cement Office which was open at that time. I remember the letter of March 31, [165] 1917, Exhibit 97. I think I answered that letter. I haven't any copies of my answers; they were either left in the company's files or taken by the District Attorney's office. I do not recall what answer I made. I kept a company file at the cement plant and a personal file. Some of the letters which the District Attorney has introduced passing between Mr. Butchart and myself were from my personal file and some from the Cement Company's files. I can't distinguish which were in my file and which were in the company's file. Personal correspondence I filed in my personal file and company correspondence in the company's file. I think I got about one hundred answers to my circular letter, Exhibit 99. The sending out of this circular letter was authorized by Mr. Butchart. The letter from the Olympia Hardware Company dated February 11, 1916, and my answer dated February 18th, Exhibit 100, was one of the inquiries received. Exhibit 101 is another of those letters. Letter from the City Engineer of Walla Walla dated February 1 and my answer is another. All of these would be in the company's

file as company business. I may have taken them from the company's files or the District Attorney may. I think I took them out and afterward the District Attorney took them out of my files. The other inquiries were turned over to the Sales Department, to Mr. Clark M. Moore after he became sales manager. When Clark M. Moore assumed the office of sales manager these inquiries were turned over to him by me with the separate file kept for the sales department and his personal attention was called to these letters. We had secured freight rates at that time and were ready to quote prices and to do business. I do not recall from whom the other [166] inquiries came. I didn't attempt to take all of the inquiries; I don't recall how many I did take. I may have taken half a dozen, enough to show the nature of the correspondence, two of them from Walla Walla and one from Olympia. Mr. Butchart arrived from California before Clark M. Moore. I think he arrived in the evening or the early morning and I saw him immediately after the following day. The matter of the limitation of territory was explained to me at the first meeting and discussed at several meetings afterward during the next two or three days. He told me that it was the result of a conference between himself and the California and Washington companies, naming Henderson and Coats particularly and Rogers of the Spokane company. He also mentioned Erlin and he spoke about the Washington and California manufacturers. Those were the names of the only

parties which I recall at the present time, and he told me that he had agreed with these gentlemen to limit his territory. Mr. Rogers was of the Lehigh Company, Mr. Henderson of the Pacific Portland. Mr. Rogers' plant did not ship into the Oregon territory but he was there to protest against our bringing down the freight rates. Mr. Butchart said that Mr. Rogers had complained bitterly because we had had the freight rates reduced east of Umatilla and because we had had Hollister over there soliciting business in eastern Oregon which was the territory of the Spokane company and they didn't expect us to break into it and that he suggested that Clark M. Moore be put in as sales manager instead of myself. He said Mr. Rogers had recommended it at the recent meeting in California. He said that Mr. Henderson and Mr. Coats had insisted on my being succeeded by somebody; that I was persona non grata [167] to them, that they couldn't trust me to carry out their agreement. I do not recall having had any business dealings with Mr. Henderson. We purchased a little cement from the Pacific Portland through their local agent I think. We had no trouble with Mr. Henderson about the purchase of that cement: we made a settlement in a friendly way. In this conversation Mr. Butchart said that the Oregon Company was to sell at the prevailing price at that time, that there was to be no cut or change in the prices; that the Oregon company was to be given the privilege and right to name the prices in Ore-

gon. I told Mr. Butchart in regard to Mr. Hollister's activities in Eastern Oregon that I had sent him through there primarily to look into a bond issue and try to prevent it. The bond issue was for flotation for building bitulithic paving. I think Hollister had only been to Baker City, Pendleton and La Grande and not into Washington at all. We didn't have any cement to sell at that time, but expected to have some very soon and the bitulithic people were promoting this bond issue to build bitulithic pavement and we wanted to prevent that if we could. I told Mr. Butchart it was a very unwise thing to limit our territory. That we hadn't gone even where our freight rates would legitimately carry us and I doubted the possibility of selling our output in the limited territory. Mr. Butchart told me that Clark M. Moore had already been selected as sales manager and that a board meeting was to be called in a day or two to install him as soon as he had arrived from California. He was still in California. And he told me that Clark M. Moore was selected at a conference in San Francisco between March 17th and March 25th. Clark M. Moore arrived on April 14th. [168] I saw him at once. I had a conversation with him about this agreement with Mr. Butchart, told him what had happened and received his absolute promise that he would not abide by any such agreement or be a party to it if he were made sales manager. I told Clark M. Moore that the territory had been restricted, that we were not to sell in Washington.

were not to sell farther than Central Oregon and a limited territory on the south. Clark M. Moore said he would sell cement where our freight rates would carry us and wouldn't be a party to any such agreement. It was possibly a few days later when I turned over to Clark M. Moore the files of the sales department and called his attention to the number of replies to my circular letter. I was vice-president and treasurer of the company at this time and sales manager. The only consultation that I had had with Mr. Butchart in regard to entering into such agreement is contained in the correspondence which has been introduced here in evidence. I do not remember whether Mr. Butchart or myself was the largest stockholder in the Oregon Portland Cement Company at that time. I was vice-president, sales manager and a director. The directors' meeting was held the evening of the same day on which Clark M. Moore arrived in Portland and at that meeting he was appointed sales manager upon my nomination. I had several conversations with my co-directors between the 11th and 14th of April, 1916. We ascertained that a majority of the board, including some dummies controlled by Mr. Minor, were absolutely controlled by Mr. Butchart and that any protests were unavailing, and it was a matter of compromise, putting them in instead of being forced out. I nominated Clark M. Moore as sales manager after he had agreed that he would not under [169] any condition carry out the agreement made by Mr. Butchart in California.

He was elected two days prior to the date on which he took dinner at my house. My reasons for nominating Clark M. Moore who Mr. Butchart told me was to be elected for the purpose of carrying out an unlawful agreement, were several. One was that he had given me his word of honor that he would not carry out the illegal agreement; another was that Mr. Boettcher had fallen down about \$70,000,00 on his subscription and I had been foolish enough to take my own stock, my life savings, and borrow money and put up my stock for the benefit of all of the stockholders and it meant a liability of interest of about \$400.00 a month and it was to my interest to see the plant running and to try to save it instead of losing every dollar I had on earth. I didn't say that the election of a sales manager to carry out this illegal agreement was the proper thing for the stockholders. It was done to have harmony in the company and at the same time I was trying to protect the company and to prevent the illegal combine that Mr. Butchart had entered into on behalf of the company. I had talked to Clark M. Moore prior to his election. He had given me his word of honor. I had discussed the matter with several directors and told them I thought he was sincere and would not enter into the illegal combine and I thought we ought to give him a trial. After his appointment I had Clark M. Moore and his brother, J. E. Moore, come to my house for dinner. I was satisfied with the promise which he made me, otherwise I would not have

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(Testimony of Aman Moore.)

nominated him for office. I also exacted an additional oath from him. He gave me his oath on the square. It is not necessary to explain what this means. It is a Masonic [170] oath, and he gave me this oath that he would not enter into any combine and I exacted this oath from him as from one Mason to another. The first from the Oregon Portland shipment made Cement Company was on June 6, 1916. I am positive of this date. If the records show that the first shipment was made on June 9th they have been tampered with. I have my memorandum of the record. I was at the plant at the time. I think it was shipped to Corvallis upon one of the orders which I had taken some months previously. I think it was shipped to Foster. If the bill of lading and other papers show it was on June 9th I would have to acknowledge that I am wrong, but my judgment is that the memorandum I made and all the records show June 6th. It may have been invoiced on the 9th. Quite often the invoice will be a day or two late, but I am certain it was on June 6th that it was shipped. Probably more than one car was shipped the first day. We continued to ship right along each day thereafter. There was a lot of orders booked. They probably continued shipping right along. I said that Clark M. Moore carried out this unlawful agreement and didn't keep his promise to me. The first knowledge I had of this was a few days after he was elected sales manager, perhaps a couple of weeks afterward, the

evening before he left for Denver. I called on him at the Portland Hotel-no I think it was a day or two after he was elected sales manager—he put in a call for Coats and Eden in their Seattle office and in my presence talked to them as "Jack" and "Al" and advised them that he had been installed as sales manager and that they need have no worry; that everything would be carried out O. K. That was the first intimation I had. That is the substance of the conversation. Prior to the time [171] Mr. Butchart arrived from California there were no two factions except as these sales matters created two factions; one faction wanted to go into the combine and one didn't, but there was nothing of this prior to my talk with Mr. Butchart when he arrived here on April 11th. That was the beginning of the factions. In my letter to Mr. Butchart of December 23, 1915, advising him of his election as president and discussing certain difficulties which had been between his brother and myself, this was a little personal tilt with his brother. It wasn't necessarily a matter of faction at all. At the same time Mr. Minor and the dummies which he had put in lined up to carry out that program. Yes Mr. Minor lined up with the dummies to carry out the program. If we had had some honest attorneys that trouble would never have occurred. Mr. Cotton did not line up with the dummy faction. The dummy he put in was honest and stayed with us regardless of orders given by Mr. Minor—that is Jimmy Wilson. I had known Clark M. Moore

about a year previous to the time he was made sales manager; I met him casually in the Colorado office, never knew him intimately at all. I knew that he was sales manager of the Colorado companies. I didn't discuss with him whether he had given up his position as sales manager of the Colorado companies. The Colorado companies did not compete with the Oregon Portland Cement Company. They were too far away and there were other plants, Utah plants, between Oregon and Colorado. The Oregon plant would meet the Utah plant at Huntington, Oregon. That was as far west as the Utah mills shipped and as far east as the freight rates would permit the Oregon company to ship, although the equa-distant point was somewhere near Boise. [172] first knowledge I had of this combination was on April 11, 1916, although of course I could draw my own inferences from the correspondence I had previously had, the Hollister letter, etc., and the knowledge that I obtained on April 11, 1916, was by direct statement from Mr. Butchart that he had made this agreement. He did not say anything at that time about Clark M. Moore making any agreement. After Clark M. Moore began to act as sales manager he went ahead to fill that agreement, notwithstanding his promise to me, and carried out this policy until I began to make trouble for them, and then they started to cover. The first knowledge I had was June 9th, I mean the first action I took. I had gone to one of the directors, in fact to two of them and had them write

letters to various mills in California and in Washington and the Oregon mill asking for quotations, both at Oregon City and Vancouver and at different points in Washington. The letters all came back from all the companies uniformly, the Washington mills quoting ten cents a barrel higher at Oregon City. These letters are in the record, I think known as the Bates letters. I am telling you the method by which I started. I will say I began to make trouble June 9th. This was the date on which I prepared a complaint for injunction in the State Court. I have no copy of that complaint."

Thereupon the witness was shown a paper which was introduced in evidence marked Defendants' Exhibit 6. He testified that it looked like a copy of the complaint prepared by him for filing in the State Court but that he would not testify positively to it. The paper was marked Defendants' Exhibit 6 and introduced in evidence and read to the jury.

The witness further testified: [173] "This complaint was prepared under my direction and I swore to the statements contained therein. In this complaint it is said: 'Recently said Clark M. Moore at San Francisco, participated in a conference between the agents of the defendants incorporated in California and finally perfected out and rounded out the schedule heretofore mentioned, and upon his arrival at Portland, Oregon, he then and there held conferences with one Irwin, etc.' This was a little less than two months from the time that Mr. Butchart had told me that he had made the agree-

ment; he made the agreement in March. I said it was made by Clark M. Moore because agreements of that kind are like a living thing, they shed their bark; they have to be continued. This agreement of Clark M. Moore was simply a detail and new price sheet to be gotten out. He became an instrument in their hands for carrying out the general agreement entered into by Mr. Butchart with the members in San Francisco. At the time this complaint was prepared I had knowledge of the agreement made with Mr. Butchart, had had a talk with him. The complaint was sworn to, ready to be filed and the object was to prevent the meeting from taking place, and an injunction was prepared in accordance with the prayer of the complaint and signed by Judge McGinn and with my attorney I went to Mr. Minor's residence with that injunction order and gave him a copy of it. It was not served because Mr. Minor agreed that there would be no quorum; the meeting wouldn't be held. When this complaint was prepared it was based upon an agreement made by Clark M. Moore and not Mr. Butchart though I had knowledge of the agreement made by Mr. Butchart, because the complaint pertained to the particular schedule [174] set forth in the complaint. The agreement made by Mr. Butchart was made by Mr. Butchart on behalf of the Oregon Portland Cement Company and the California mills and the Washington mills. It did not include the southern California mills but only the northern California mills. Mr. Rogers was

present at the meeting, no doubt representing his own and the International mill, and the agreement included the western Washington mills and the eastern Washington mills, especially the territory of Eastern Oregon which the Oregon company was supposed not to invade and which belonged to the Spokane mills. The Three Forks Portland Cement Company was added because Clark M. Moore was then sales manager of the Cement Securities Company which controlled three cement companies, the Three Forks Company, the Union Portland Company and the Colorado Portland Company. In my testimony I said that the Colorado Cement Company and the Utah Cement Company were not natural competitors of the Oregon Portland Cement Company by reason of the freight rates. A few years previous we shipped cement to the entire Coast from Colorado. We had a freight rate as low as the Pacific Coast at that time. I used the word 'natural.' The unnatural meeting of cement agents in one room and railroad employees in another room have torn down freight rates and they are as high to-day for 150 miles as the natural rates were for 1.000 miles ten years ago. I presume the Three Forks. Union and the Cement Securities Company and the Riverside Portland Cement Company have been in this combination from the time it was formed. I don't know when this was. The evidence brought out in this trial showed they had been in it for two or three years. I was not aware of that [175] fact at the time. Mr. Butchart framed up the original

agreement in restraint of trade, and Clark M. Moore was appointed as the instrument to carry it out and further develop it. On May 26th Clark M. Moore was in San Francisco and there was a meeting of the California manufacturers, at which time the new price schedule went out to all California and Oregon companies from the Portland office under date of May 29, 1916. The price list was prepared and later sent out as freight schedule signed by Fred Muhs. I presume that the Vancouver Portland Cement Company had been in this combine for some years, for they hadn't been shipping into the United States and the Washington mills were not shipping to British Columbia. In the complaint to which my attention is called I say that an executive committee was appointed and that the purpose of this complaint was to prevent the abolition of the executive committee and the two vice-presidents. Mr. Butchart was chairman of the executive committee and Mr. Newlands and myself were the other two members. This committee had been in existence since the company was organized. That particular committee was selected I think when Mr. Butchart became president on December 21, 1915. I don't recall any meetings ever held by this committee. My recollection is that the first shipment of cement made by the Oregon Portland Cement Company was on June 6th. This complaint, to which my attention is directed. was prepared, the injunction order obtained and the injunction taken out to Mr. Minor's house on

the evening of June 9th. Prior to making this complaint I discussed the matter and made complaints to the directors, probably to all of them individually, and discussed it with Mr. Bates, Dr. Smith, Dr. Moore and Jimmy Wilson, and I think with Mr. Minor-with [176] Mr. Minor I think a few days prior to the filing of the complaint, in his office. If Mr. Butchart was here I discussed it with him personally and when he was not here I wrote to him. I can't recall when I wrote him; all the correspondence is in the hands of the District Attorney and the attorneys for the Oregon Portland Cement Company. I took a trip to Seattle, made before the preparation of that complaint but didn't see Mr. Butchart. I got back from Seattle on the 9th. I recognize the letter which you show me, a letter written by me to Mr. Butchart on June 19th."

The same was introduced in evidence marked Defendants' Exhibit 7 and read to the jury.

"I called the attention of the president of the company to the action of Mr. Clark M. Moore in entering this combination. It was my custom in writing letters to segregate one item from another. The probabilities are that on the same day and in the same mail another letter was written concerning the illegal matter. He had a copy of this complaint which I forwarded to him. I have no copy of those letters. They are in the files somewhere, in the file which the District Attorney had. When I was vice-president and sales manager I

had a stenographer write a number of letters. If the letters were of a personal nature they were put in my personal file. If they related to the company's business they were put in the company's file. I recognize the letter which you show me. It was written in an effort to correct matters and straighten them out."

The letter identified by the witness was introduced in evidence, marked Defendants' Exhibit 8 and read to the jury. [177]

"I recognize the letters contained in this file shown to me. This letter is one of the numerous replies to the circular letter sent out in January."

The letter identified by the witness was introduced in evidence, marked Defendants' Exhibit 9. and read to the jury.

"This letter was signed by me as vice-president and treasurer. I sent the circular letter to the Hawaiian Islands, Seattle and to Tacoma, circularized southwestern Washington as far as Seattle, Alaska, Hawaiian Islands, all of Oregon and around the Walla Walla country in Washington not quite The circular letter was sent to Seattle to Spokane. with the expectation of selling in Seattle and in Tacoma. In the letter of February 2, 1916, in reply to inquiry from Alexander and Baldwin I wrote, "We should be able to compete with any other plant manufacturing on the Pacific Coast for shipment into Hawaiian territory, providing shipment could be made direct from Portland. If, however, we should be compelled to ship via Tacoma, that

would be nearly thirty-two cents as against nineteen cents from the factories of the northern Washington companies." The freight rate was 13 cents a barrel more from Portland than from the Washington companies. Yes we could compete with the Washington mills in Seattle and Tacoma. The mill price may be anywhere from a variation of a dollar a barrel; some places you may get fifty cents or a dollar less than you get at some other place, and it is the average total f. o. b. mill price that makes up your selling price. For business in Seattle we could no doubt afford, if we needed a volume of business to keep the plant running, we could easily take a volume of business there and be profitable too at say 13 cents a barrel less than you give the Washington [178] mills. They might do the same thing in Portland. It is my idea that we can compete with another mill if it has a differential in freight rates of 13 cents a barrel. I have a plant in California with a differential of nearly a dollar a barrel in the San Francisco market,—the difference between 9½ cents freight rate per hundred pounds and the freight rate of 261/2 cents per hundred pounds; that makes 68 cents a barrel. After this complaint which has been shown me was prepared, in addition to the letter which I wrote Mr. Minor, which is in evidence, suggesting certain directors, in discussing that letter with Mr. Wilcox he suggested and requested that I go to Denver and discuss the whole matter with Mr. Boettcher before any action was taken. I was in Seattle

on my way to Denver when I received notice that this meeting was called to replace me and then I came back. The complaint was served but not filed because Mr. Minor agreed upon not having any quorum and so there would be no action taken and no meeting held until I had time to go and confer with Mr. Boettcher. I then went to Denver and conferred with Mr. Boettcher some short time afterward. I did not agree at that time with Mr. Boettcher upon any settlement of this matter. Mr. Boettcher agreed to come on to Portland and a little later he and Morse,—Morse is general manager of the Cement Securities Company, came to Portland to settle upon it. No suit had then been The question was of taking action to prevent the company from participating further in the combine. Mr. Boettcher agreed that would be remedied, that Mr. Clark M. Moore would be replaced as sales manager and that while Mr. Butchart might remain president I would be placed in a position where I would [179] not only manage the plant but manage the sales and see that nothing illegal was done. This matter came up about a week after Mr. Boettcher returned, at a meeting in Mr. Minor's office with Mr. Clark M. Moore, supposed to represent Mr. Boettcher and Mr. Ross, supposed to When I called at Mr. represent Mr. Butchart. Minor's office I was informed that an entirely different program had been arranged, not at all in accordance with the agreement made with Mr. Boettcher and Mr. Morse. While they were here it was

agreed between Mr. Boettcher, Mr. Morse and myself, that Mr. Clark M. Moore should remain as sales manager temporarily and Mr. Butchart as president temporarily. Only the proposition that Mr. Newland should resign and I act as superintendent of the mill, was in the modified condition proposed in the meeting held in Mr. Minor's office. They were willing that I should have any salary I should ask for, that I should manage the plant but should not interfere with the sales; that if I had any fear of being indicted for violating the law I should resign all my titles and they, as officials, of the company would thereby be the legal guilty ones. In other words a subterfuge the whole proposition proposed by Mr. Minor to carry out. In my letter of December 23d, Government's Exhibit 87, in which I say that Mr. Ross suggested that we could arrange to ship a car of our sacks to Mr. Butchart's mill, have them filled by him and returned to Portland, store the same on the docks and start making deliveries immediately of Oregon cement, but that Mr. Butchart would know best about the matter and I would be guided by his wishes and that I presumed that it would be necessary for Mr. Butchart to have a satisfactory understanding with some of the Washington people before he would [180] want to make such arrangements, I so wrote because I had already discussed this matter with Mr. Butchart and Mr. Butchart had explained to me that some years previously he had been unable to fill orders in

British Columbia, had invited the Washington and California people to ship into British Columbia. that they had done so with the understanding that the arrangement was only temporary while he could not fill the orders and that later he had increased his plant and could fill the orders and had notified them to stop, but that one of the companies failed to stop and shipped 40,000 barrels into British Columbia, and that he thought he could arrange with the companies in Washington and California so that he could ship back that 40,000 barrels here without having a row over the matter. This was not the first suggestion about shipments. It had been discussed on two or three occasions prior to that time. In the same letter I stated that Mr. Ross had suggested that there would be a meeting in San Francisco of cement manufacturers within the next week or ten days and asked Mr. Butchart whether he contemplated attending this meeting and if not whether he advised us to have a representative there. Mr. Ross is Mr. Butchart's son-in-law and suggested that it might be proper for us to do so and I wrote Mr. Butchart to find out. I recognize this paper. It is my signature to the same. It is a call for a meeting of the directors of the Oregon Portland Cement Company."

This call or paper was then offered in evidence, marked Defendants' Exhibit 10 and read to the jury.

"In the paper there is date 14, in pencil 24, I think 14th is the correct date. It was held back

nearly two weeks by the secretary before it was sent out, during which time another call was prepared by Mr. Ballard, another [181] vice-president. In this call, signed by me as vice-president, on the 14th day of August, 1916, I said that this agreement with reference to fixing a price in the city and with reference to limiting the territory to the Columbia River and east to Umatilla, I said was made by Clark M. Moore. In the call also I named the eastern Washington companies as well as the California and western Washington companies. In my testimony on direct examination I said that this agreement was made with Mr. Butchart and that he informed me of that on April 11th. Both statements are correct, that contained in the call and to which I testified on my direct examination. I now say at the time the call was issued that Mr. Butchart had made that agreement, Clark M. Moore had further acted as a tool of Butchart and the allied interests in carrying it out, had conferred with these people later reconfirmed the agreement and perfected the manner of carrying it out. I left out Mr. Butchart in the call because he was absent at that time. I left out any statement in connection with his making any agreement because he was absent and not in the United States and Mr. Clark M. Moore was here and in active charge. I had several conversations with Mr. Butchart when he came from California in reference to this agreement. The matter was discussed for three or four days at meetings

at the Portland Hotel and at my office at the plant. He simply said that they had held this meeting; that Mr. Henderson and Mr. Coats had said I was persona non grata in the sales department; that Mr. Rogers had come there from Spokane and had bitterly complained about having the freight rates interfered with in eastern Oregon so that they were the same as the Spokane mill; that the territory [182] had been restricted, that we were to sell only in restricted territory, practically the Willamette Valley and central Oregon; that Clark M. Moore had been recommended by Rogers and O. K.'d by the other interests there at those meetings of the California and Washington manufacturers: that he had later conferred with Mr. Butchart down at Coronado and Clark M. Moore was then on his way and would be at the Directors' meeting in a day or two and would be installed in my place. On the previous trial I said the territory was limited to Drain on the south, to the Des Chutes river on the east and in my direct testimony on this trial I said that it was limited to Roseburg on the south and Umatilla on the east. This is practically the same thing, that is central Oregon and the Willamette valley. Mr. Butchart in his conferences with me upon his return from California said Central Oregon and branch lines into Central Oregon and the Willamette Valley. He didn't fix either Des Chutes or Umatilla. The Willamette Valley would be some point I suppose north of Roseburg, somewhere in the vicinity of Drain. Mr.

Butchart limited the territory to the Willamette Valley. He did not mention the towns but the Willamette Valley. I think he did say in the vicinity of Roseburg. Mr. Butchart remained in Portland at that time from the 11th to the 14th of April. He left the same night that Clark M. Moore was installed as sales manager. I think Mr. Butchart made one trip here after that, but I am not positive that he was here at all. If he was I don't think I spoke to him. There is no relationship between Clark M. Moore and myself. I had met him two or three years prior to this time when he came from California. In telling Clark M. Moore of the conversation which I had had with Mr. Butchart I repeated the conversation which I [183] had with Mr. Butchart and in my talk with Clark M. Moore probably stated the south line of our territory as the Willamette Valley and Central Oregon and the Columbia River on the north. Clark M. Moore's reply was that he wouldn't be a party to any such agreement; that he would sell our cement where the freight rates would carry us, which of course meant as far north as Olympia, Washington and as far east as Huntington; in fact, as far north as Seattle. I said that Clark M. Moore immediately began to carry out this agreemnt. I remained in Portland I think until the following November and was familiar with the operations of the Cement Company during that time. Immediately after I started the action against them, on August 28th, they sent Hollister out in an effort

to cover up. He had made one trip in Washington after the action was filed on June 9th. I am not absolutely positive but that they made some sales outside of this territory after June 9th. The first sale as I have said was made on June 6th. They didn't immediately begin to go outside of the territory. They had refused to make any sales whatever outside the territory up to June 9th. quoted higher prices in every instance for points outside this territory although in many places the freight rates would be the same. They had refused to answer the many inquiries from Washington and points beyond this territory which I had turned over to Clark M. Moore. I haven't access to the records of the Company but it is my recollection that no shipments were made outside the restricted territory until after the action was filed on August 28th, although there may have been one or two shipments made during that period. The action filed on August 28th was suit commenced by me in the Federal Court against the same defendants mentioned in [184] the suit prepared for the State court. I did not include Mr. Minor in this suit but he was mentioned in the first suit. I didn't include Mr. Minor because my lawyers took pity on him as a brother lawyer. They felt he was guilty but out of respect to his profession they eliminated him. I had a conversation with Mr. Minor in his office the morning after June 9th when the first suit was prepared. I did not admit to him that he had no knowledge of this condition

stated in the complaint. Upon the former trial of this case I did testify in regard to the conference with Mr. Minor as follows: 'Now, with reference to this matter of notification to Mr. Minor about his alleged division of territory; you say that you did not have a talk with Mr. Minor June 10th, the day subsequent to the filing of this state suit in the state court—not a filing of it, but to the time you took the complaint out to Mr. Minor's house—or did you have a conversation with him? A. I had conversations very frequently with Mr. Minor. Q. Who was present at that conversation? A. Usually Mr. Minor and myself. Q. But you deny that you admitted in that talk that the charges preferred against Mr. Minor in that complaint were not true? A. Yes— Q. And the charges against him were a mistake? A. I absolutely deny that. I did have a talk, but I told him that while he might not have been advised of all the facts, and might not have purposely been a party to the illegal acts of the others, at the same time his attitude of defending them, in my judgment, made him equally guilty, and for that reason he was made a defendant and afterwards I was willing to withdraw him as a defendant and give him the benefit of the doubt.' I did say that Clark M. Moore was made sales manager upon my nomination by reason of the [185] talk which I had with him prior to that time and his promise. I made statements to other directors prior to nominating him as to his

qualifications or fitness for the position, made a statement to Mr. Minor and other directors about this, told Mr. Minor that he was a man of experience and should have the ability and that he had given his word of honor that he wouldn't carry out the illegal arrangement previously entered into by Mr. Butchart. I told him that Clark M. Moore had given me his word of honor. The other directors at this time did have knowledge of the fact that Mr. Butchart had made this agreement. Upon the former trial of this case I testified as follows: 'Q. Just prior to that meeting do you remember having a talk with Mr. Minor with reference to Mr. Clark Moore? A. Yes, sir. Q. Do you remember where that conversation was had? A. Probably at his office. Q. At that conversation, with you and Mr. Minor present, is it or is it not a fact that you said to Mr. Minor that Mr. Clark Moore was a suitable person to be appointed as sales manager, addressing Mr. Minor as director? A. I recall stating that to Mr. Minor and stating that to all the directors. Q. You said that to all the directors? A. As far as I know, yes. Q. Do you know whether the other directors at that time had knowledge of this supposed agreement between Mr. Butchart and the California and Washington companies? A. I doubt whether they had any knowledge of it. Q. You had knowledge of it? A. I had knowledge. Q. And notwithstanding that knowledge, you recommended Mr. Clark Moore to all the other directors? A. Yes, sir. Q. Resigned

in his favor and nominated him for the position? A. Yes.' At the former trial of this case I said I doubted whether the directors had knowledge of this arrangement made by Mr. Butchart. At this trial I have said that they did [186] have knowledge of it. It is my recollection that they did have; I will still use the word 'doubt.' I won't be positive whether I talked with all of them and told them all the facts in the matter at that time. The agreement with regard to prices which I said Mr. Butchart told me he had made, was carried out up to the time that I brought the suit on August 28, 1916. The price at which cement was sold by the Oregon Portland Cement Company during that period was at the schedule set forth in that complaint and I say that the Oregon Portland Cement Company confined itself to the schedule set forth in that complaint. I don't know the exact date on which the old company, I mean the Portland Cement Company of which I was president and general manager, was reinstated. It was at the time when the reorganization was completed and previous to the time when the properties were transferred to the present company. It was just about the time of the reorganization of the new company, perhaps just previous to the incorporation of the new company. It was a part of the work to be carried out by the attorneys in order to complete the organization of the new company. The price of cement of the Oregon Portland Cement Company is the same price set forth in my complaint

in evidence in this case and in the call for the meeting in evidence in this case. Other cement companies were selling at the same price. Generally speaking Portland cement is a standard article, possessing certain qualifications which all Portland cement must possess if it is to be used in contracting jobs. The properties of the testing society are so variable that I cannot say whether cements possess other different properties than those required generally by the testing society. If cement is required for Government work there may be a special [187] specification that is not covered by the requirements of the society of testing materials. Cement for Government work requires a low percentage of silica, a low percentage of magnesia and a low percentage of sulphur. Cement does not necessarily have to stand tests for any particular time or have to be used for any particular time in order to be suitable for Government work. It depends on what work a contractor is doing whether he would give more for one cement than for another. In the general market different cements are better for certain work than other cements owing to the chemical constituents, quick hardening and slow hardening due to the amount of aluminum and iron, due to the ratio of iron and aluminum to the silica. Some cements will harden as well in seven days as others will in three months. In using cement in concrete work contractors want a quick hardening cement so as to remove the forms quickly. In Govern-

ment work the Government will restrict to low aluminum on account of the sea water effects on aluminum. The Government might want a higher ratio of silica to iron and aluminum. Upon the former trial of this case I did testify as follows: 'Q. In that connection Mr. Moore, cement is all of a standard quality or grade is it? A. Is what? Q. Cement is all of a standard quality or grade? A. That is sold under a guarantee to meet a standard specification. Q. Well, any cement that conforms to the standard specifications will answer the requirements of cement dealers and users, will it? A. Yes, sir. Q. Is one cement better than another? A. Yes, sir. Q. Do dealers pay more for one cement than they will for another? A. No, sir. Q. Do you know why? A. Because they can't sell it for any more. Q. As long as it stands the specifications and meets all the requirements, why that [188] is all that is necessary to a contractor using the cement. Q. And dealers will not pay more for one cement than they will for another then? A. No, sir. Q. Did you testify to that on the last trial? A. Will you read the balance of the testimony, please? Q. Then as a matter of fact where an article is standard and dealers won't pay more for one cement than they will for another, the price is apt to be uniform, is it? A. Not necessarily, there are exceptions to that. Q. In what manner, Mr. Moore? You say the dealers won't pay more for one than they will for another; how are we going to get an exception for that?

A. There is a great deal of cement that is sold not under any specifications, but lots of times the contractor or consumer will get in the habit of using certain brands because it works well under the trials or for physical properties, and that man will pay as high as fifty cents a barrel more for that brand than he would for another brand. Q. You know of particular instances in which that was done, do you? A. I can't recall any particular instance at this time, but I could refer back to notes, and probably call attention to a hundred of them.' My testimony at the last trial defines under what conditions a higher price would be paid for one cement than for another. Contractors will not pay more for one cement than for another for work for ordinary sidewalk or foundation or roadway work; but on other work like reinforced concrete or marine work, special construction, irrigation work, they do pay more, depending on the particular quality of the cement. For instance, the Government paid \$3.50 for the cement used in the construction of Pearl Harbor at Honolulu because it contained iron and not aluminum, using a product made in Germany. [189] Sea water attacks aluminum and does not attack iron. The Washington mills withdrew from the Oregon territory soon after the first of the year 1916; they stopped taking new business but continued to deliver cement on certain orders they had, including a highway contract. Mr. Butchart told me that he thought if we needed the Oregon market the Washington com-

panies might withdraw later but not at that time. He didn't say anything about an agreement made, a definite agreement that they would withdraw. I am sorry to say Mr. Minor was attorney for the company during the year 1916; am sorry to say he was a director of the company. I think I told the company's attorney and directors that Mr. Butchart was entering into this combine almost immediately after Mr. Butchart returned and I found it out, within a few days at least. I think I discussed it with him prior to June 9, 1916, but I can't swear to that absolutely. He asked me for evidence in support of my statement and I furnished him some evidence about June 9th. I gave him the original letters that I had secured from Mr. Paul Bates showing that the Oregon Portland Cement Company was quoting a higher price to Vancouver, Washington than the Washington mills 350 miles away and that with our freight rate lower, and the letters showing that Washington quoted ten cents higher on this side of the river although the freight rates were the same. I showed him a copy of the telegram to Galbraith-Bacon refusing to quote in Seattle; and told him about the conversation between Clark M. Moore over the phone to Eden and Coats in Seattle; and about the conversation that Clark M. Moore had with Eden in Seattle before he quoted Galbraith-Bacon, and that Mr. Butchart was present in [190] Seattle at that time. I did not show him the original letters which I had received from Mr.

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Butchart from California. I gave him what I considered an abundance of evidence. I don't think I said anything to Mr. Minor, the attorney for the Company, about any correspondence between Mr. Butchart and myself and I don't think I gave him any of the letters passing between Mr. Butchart and myself. These letters were then in my personal possession in my personal file. I am not sure that all of them were in my file; some of them may have been in the company's file. I will not attempt to pick out those which were in my file and those which were in the company's file, but would say that the company's business were in the company's file and personal and private correspondence with Mr. Butchart were no doubt in my personal file. I won't attempt to pick out what I considered personal correspondence of what was in my personal file. It has been a long time ago; these personal letters of Mr. Butchart were no doubt in my personal file. Business correspondence was no doubt in the company file. Upon examining these letters and noting the numbers of the exhibits I would say that number 98 is a company letter. I should think that Exhibits 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96 and 97 were in my personal file. I think Mr. Boettcher was in San Francisco when I received the final payment of his commitment. I am not sure of this and I think it was a few days prior to the day of incorporation of the new company. I think I went to Reno, Nevada, to file the incorpo-

ration papers immediately after Mr. Boettcher's final commitment was paid in. I identify this telegram as one sent by me." [191]

The same was marked Defendants' 11 and introduced in evidence.

Thereupon the witness was shown certain other letters, particularly letter written by Mr. Wirt Minor to Mr. Aman Moore, dated July 25, 1916, and which the defendants desired to and offered in evidence. To this letter the attorney for the United States objected upon the ground that the same was immaterial and the Court sustained the objection, and to this ruling the defendants excepted and the exception was allowed, which said letter is as follows:

"July 25, 1916.

Mr. Aman Moore,

c/o Mr. Coy Burnett,

Lewis Building, Portland, Oregon.

Dear Sir:-

I am in receipt of communication dated July 24th addressed to the Directors of Oregon Portland Cement Company and signed by yourself, in which you demand that an immediate directors' meeting be called for the purpose of obtaining various data from the parties named; that is to say, Mr. R. P. Butchart, Mr. Newlands, Mr. Macdonald, Mr. Clark M. Moore and Mr. Ballard to the end that the suit may be instituted under the Federal 'Treble Damage Statutes' for the damages sustained by the Com-

pany through alleged illegal agreement on the part of the gentlemen above named.

This matter was brought before the Board informally at its last meeting and you were requested by myself to state what action you desired to take but for some reason you did not see fit to do anything whatever.

The by-laws of the corporation, Article IV, Section 4, provide that [192]

'Special meetings of the board of directors shall be called by the Secretary when he is requested so to do, by the president, on three days' notice to each director.'

Special meetings shall be called in like manner on request of a majority of the members of the board. You are aware that the president of the corporation is now absent. You yourself are one of its vice-presidents. Section 2 of Article VI of the by-laws provides that

'In the event of the absence of the president, one of the vice-presidents shall exercise the powers and perform the duties of the president during such absence, subject to the advice and control of the board or of the executive committee.'

You therefore, have it in your power to call this meeting and I shall be pleased to have you do so. If you are not willing to take the responsibility of calling the meeting I am perfectly willing to be one of a majority of the board to call such meeting. It will require this call to be signed by five of the

directors. Mr. Butchart is away; Mr. Bates has tendered his resignation, but it has not been accepted as yet at your instance; Mr. Wilson has tendered his resignation, but the same has not yet been accepted; and Mr. Johnson is away. It will, therefore, be necessary for you to be one of the five directors to join in the call.

If you desire to have the meeting called, as suggested, and will come to my office I shall take pleasure in preparing the call and in signing it. I do not know, however, whether Mr. Butchart and Mr. Newlands who are charged by you with malfeasance in office will consent to sign such call or not; if not, you will have to procure the signatures of Messrs. Wilson and Bates.

As Mr. Butchart and other directors are charged with malfeasance in office, I think it will be but reasonable that the meeting when called shall be called for such time [193] as to give these parties an opportunity to attend and respond in person.

Yours very truly,
WIRT MINOR."

WM/R.

Thereupon the defendants offered to identify by this witness for the purpose of introducing in evidence, and when identified to introduce in evidence, a letter from Wirt Minor to the witness dated August 29, 1916, and to this letter the attorney for the United States objected upon the ground that the same was immaterial and the Court sustained the objection and refused to allow the said letter to be identified or to be introduced in evidence, and to this ruling the defendants excepted and the exception was allowed. Said letter so offered is as follows:

"August 29, 1916.

Mr. Aman Moore, Oswego, Oregon.

Dear Sir:—

As one of the directors of the Oregon Portland Cement Company and as one of its general attorneys or counsel, I hereby demand that you afford me an opportunity to investigate the facts upon which the suit brought by you in the name of the Oregon Portland Cement Company is based. In connection with this demand I also demand that you afford me an opportunity to examine all the evidence from which these facts have been deduced or inferred.

I also desire you to advise me by what authority this action was commenced for, as you are aware, it was commenced without consulting the Board of Directors. I should be pleased to confer with your attorneys at any time regarding the matter and to examine the evidence in their offices [194] and to this end I am sending a copy of this letter to each of your attorneys of record.

I will add that I have been requested to take this

step by several of the directors of the corporation.

Yours truly,

WIRT MINOR."

WM/MH.

The witness further testified: "I said that a part of the delay in organizing the corporation was caused by Mr. Butchart failing to pay his commitment. He was next to the last and Boettcher was the last to pay. Mr. Butchart was willing to pay provided Boettcher paid and Mr. Boettcher was willing to pay provided Mr. Butchart paid and it dragged along for a period of nearly three years that way. I recognize the letter which you show me. original letter was written and signed by me. letter is to Mr. R. J. Morse. He was manager of the Cement Securities plants. He didn't attend to Mr. Boettcher's business at all. He was a protégé of mine in years previous and a personal friend. I corresponded with him in regard to Mr. Boettcher's commitment to the Oregon Portland Cement Company and Mr. Morse was out here a couple of times in connection with the organization of the Oregon Portland Cement Company's business. In this letter I stated: 'The second proposition for Mr. Boettcher to decide is a matter of a selling contract with the Balfour-Guthrie Company here to handle our output. I do not want to be quoted as making any definite statements, but I believe they would contract to sell our output on a basis of ten cents per barrel margin to them for taking the account,

and in closing such a contract would possibly subscribe [195] \$50,000 to our company. Further, they would draw a line at, say, Centralia, Washington, as a dividing point for the Bellingham cement and our own, i. e., they would handle Bellingham cement north of a certain point in Washington, and handle our cement south of that point and throughout Oregon territory. I believe this would serve as a very important factor in maintaining prices here on the coast, as the Bellingham plant withdrawing from Oregon would be able to renew the old agreement with the California plants to withdraw from the Puget Sound territory, which would leave the market here to the California plants and ourself. The California plants in the past have conceded the output of 2,000 barrels a day to ourselves in event we should build a twokiln plant. The negotiations with the Balfour Guthrie Company are only in a preliminary stage, although they have been discussed on several occasions in the past. Absolutely nothing can be done with them until we are fully financed and construction work resumed. They would not subscribe a dollar under present conditions or under any conditions other than with our plant a going concern.' I also recognize the letter signed by me and written to R. J. Morse, secretary and general manager of the Colorado Portland Cement Company dated Tuesday, May 19, 1914." Thereupon the defendants offered in evidence paragraphs 1 and 4 of said

letter marked Defendants' Exhibit 15, and the same was read to the jury.

The witness further testified: "Mr. Wilcox referred to in that letter was a business man, a stockholder of the company. I don't recall when I first knew Mr. Butchart was connected with the Washington mill, the Coats mill. I don't remember [196] testifying on the former trial when I first heard that he was connected with that Company. I did testify upon the last trial of this case as follows: 'Q. Did you know that Mr. Butchart was interested in the Washington mill? A. I am not positive about that: I don't know whether he was at that time or not. Q. When did you first learn that he was interested in the Washington A. About the time we started the work here at Oswego the last time. Q. That was when, Mr. Moore? A. 1915 or '16; I don't know the exact date.' "

Upon redirect examination the witness testified: "I recognize the copy of letter of Denny-Renton Clay and Coal Company, dated March 6, 1916, my answer to the same dated March 11 and their reply dated March 13, 1916."

The same was offered in evidence marked Exhibit 103 and read to the jury.

The witness further testified: "Upon the former trial of this case in connection with the sale of some cements at a higher price than others, I testified as follows: 'Q. Why it could be marketed and sold at a higher price than any other cement? A.

Yes, sir, it has the quality of being almost immune from attack from sea water due to the fact of its high iron content and low aluminum content. In construction work in sea walls or any marine construction, the cement would be given preference by proper engineers who understood that fact.' And upon said trial I also testified in regard to the boundary line on the east fixed as the Des Chutes river as follows: 'Q. Now what was the territory allotted to the sales of the Oregon Portland Cement plant in accordance with the agreement as given to you by Mr. Butchart? A. The Willamette [197] valley and they were permitted to sell in central Oregon. Q. That is the Columbia River on the north? A. Yes, sir. Q. And the Des Chutes on the east? A. On the branch lines extending south; there may have been one branch line or two further to the east than the Des Chutes; that is the Heppner branch, I think, was included in the territory. Q. And about Drain on the south do you say? A. Some point about Drain.' I think the United States District Attorney first learned the facts within my knowledge concerning the cement combination on the morning of August 29, 1916, the day after the action was filed in the Federal Court. Mr. Reames was the District Attorney at that time."

Thereupon attorneys for the defendants moved the Court to instruct the jury to disregard all correspondence between Aman Moore and R. P. Butchart prior to the time Clark M. Moore was elected

sales manager in considering this case in reference to the guilt or innocence of Clark M. Moore and that correspondence passing between Mr. Butchart and Mr. Aman Moore should not be considered in arriving at a verdict as to the guilt or innocence of said Clark M. Moore.

Thereupon the Court stated: "Of course any statements or admissions Mr. Butchart made before Mr. Moore became connected with this company would not be competent as admission of guilt against Clark M. Moore, but would be competent for the purpose of showing the status of the Company and the condition at that time, and the admission made against the interest of Mr. Butchart."

Testimony of A. F. Coats, for the Government.

Thereupon A. F. COATS was called as a witness for the United States and testified as follows: [198]

"In 1914, 1915, and 1916 I was in the cement business in Seattle, president of the Washington Portland Cement Company. In the year 1914 I sold our cement in the state of Oregon. In 1914 the price fluctuated all the time. We had no stable price. I think cement went up in price in July, 1914. This was caused by an understanding between us, reached in Portland or San Francisco at which there were present Mr. Cameron of the Olympic Portland Cement Company, Mr. Eden of the Superior Portland Cement Company, and Mr. Muhs of the Santa Cruz and Standard Portland Cement

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(Testimony of A. F. Coats.)

Company. I do not recall whether any other California companies were there or not. I don't think Mr. Cameron of the Standard Portland Cement Company was present. I am not sure whether Mr. Erlin was there or not, but think he was. This conference took place in June or July, 1914. At this conference the naming of the price for the state of Washington was assigned to the Washington plants. I do not remember what they put the price The California companies were to make the price in Oregon and were not to sell cement in any quantities in Washington. They were not selling cement to speak of at that time in Washington. The Washington plants were to name the prices in the state of Washington and the California companies were to stay out of there. In Oregon and Washington plants were not to ship south of Salem. From that time on we continued to ship cement into Oregon north of Salem until in January, 1916. At that time I closed my office and quit taking business in the State of Oregon. There were no further conferences about that subject. I think there was a meeting or conference held in December, 1915, at which the California plants and the Washington plants were represented. [199] The parties present were substantially the same as those present at the previous meeting in 1914 and at this meeting the Washington companies were told to get out of Oregon, so told by the California companies. There was no discussion, the Washington plants were merely told to beat it and they did. I (Testimony of A. F. Coats.)

have known R. P. Butchart about twelve years. He had about a thousand shares in the Washington Portland Cement Company of the par value of \$1.00 each. I think he became a stockholder in that company in 1913. I was not told by the California companies directly to get out of Oregon and stay out, but Mr. Cameron of the Balfour-Guthrie people was told and it had been intimated all the time to us that we must do this. The California people referred to were Cameron and Muhs of the Santa Cruz Company, the same Muhs who was active in preventing the Spokane plant from getting the interstate bridge cement. Mr. Cameron was also with the Standard as well as the Santa Cruz. The Henry Cowell Lime & Cement Company was also interested in running us out of Oregon. Mr. George was connected with that Company. There was no one else active in the matter that I recall. I don't remember being at luncheon or dinner in Portland, Oregon, some time about the first of 1916 with Mr. C. W. Nottingham and Mr. Butchart "

Upon cross-examination the witness testified: "I was the controlling stockholder of the Washington Portland Cement Company. Its capital stock was one million four hundred thousand dollars and its bonded debts two hundred and fifty thousand dollars. Mr. Butchart was never a director of this company nor an officer. Mr. Clark M. Moore was never interested in this company. The first meeting to which I have testified [200] was in 1914, held either in San Francisco or in Portland. The

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(Testimony of A. F. Coats.)

only persons present at that meeting that I recall were Mr. Eden, Mr. Cameron of the Olympic, Mr. Muhs and myself. I don't remember Mr. Cameron of the Santa Cruz being there and Mr. Henshaw was not there to my knowledge. Mr. Butchart was not at that meeting nor was Mr. Clark M. Moore. The next meeting about which I testified occurred in December, 1915, in San Francisco. All three of the representatives of the Washington companies were there, Eden, Cameron and myself. I don't recall Mr. Rogers of the Lehigh being there nor Mr. Irwin of the International. Neither Mr. Butchart nor Mr. Clark M. Moore was there. I think Mr. Cameron of the Santa Cruz was there as well as Mr. Muhs. Neither Mr. Rogers of the Lehigh nor Mr. Irwin of the International were there that I know of. I am not sure whether George was there or not. I was a member of the Portland Cement Association. The meetings to which I have testified were not meetings of the Portland Cement Association and only meetings of the parties whom I have mentioned and these meetings to which I have testified had nothing to do with the Portland Cement Association. I was a member of the Portland Cement Association as long as I was in the cement business. I don't think I made any objection to this demand on the part of the California people to get out of Oregon. We were protecting our own market up in Washington. The Oregon market was never any good so far as I was concerned. While I was in business prices fluc(Testimony of A. F. Coats.)

tuated all the time. The cement manufacturers had to do a banking business for the contractors during that time and this did not interest me because we would lose so many accounts; the percentage of loss was too great. I don't think I ever [201] told Mr. Butchart or Mr. Clark M. Moore anything about the meeting which was held in 1914; did not tell them about any meeting held in 1915. I think I never discussed either prices or territory with Mr. Butchart or Mr. Clark M. Moore. I have never seen Mr. Butchart at any meeting, Association meeting or any kind of meeting. I saw Clark M. Moore at Association meetings in Chicago and New York at which I was representing my own interests and the Washington Portland Cement Company and he the Boettcher interests. I was never present at any meeting at which Mr. Butchart and Clark M. Moore or either one of them was present at which the question of where the Oregon Portland Cement Company should sell its product or the prices at which it should sell its product was discussed. I did not know any officers of the Oregon Portland Cement Company except Mr. Butchart and Mr. Clark M. Moore. I knew Aman Moore but just to speak to him."

Upon redirect examination the witness testified: "I never discussed prices or territory with Mr. Butchart at all in my life at any time or place. His plant in British Columbia was about 150 miles from my plant. I saw him quite often, several times a year I expect and I never discussed with

(Testimony of A. F. Coats.)

Mr. Butchart territorial arrangements in any way. He had \$100,000.00 worth of stock in my company and also \$50,000.00 in bonds but he didn't go to any stockholders' meetings. I was one of the defendants in this case."

Testimony of C. W. Nottingham, for the Government.

Thereupon C. W. NOTTINGHAM was called as a witness for the United States and testified as follows:

"I have lived in Portland for nearly forty years; have been in the building material business and have bought and sold cement. I cannot say with certainty from whom [202] I bought cement in 1915. I think before the Oregon Portland Cement Company began making cement we purchased mostly from the Pacific Portland Cement Company. I know Mr. Coats of the Washington Portland Cement Company and I think I have met R. P. Butchart. I frequently had luncheon with Mr. Butchart and Mr. Coats, but I don't remember the date of the same or whether I had a luncheon or dinner with Mr. Butchart and Mr. Coats at or near the first of the year 1916. Whenever they would come to town we would go out and get lunch together nearly always. I think I had lunch with these two gentlemen sometime near the first of January, 1916. In the course of this lunch it is my recollection that Mr. Coats said that Mr. Butchart being a stockholder in the Washington Port(Testimony of C. W. Nottingham.)

land Cement Company and also in the Oregon Portland Cement Company that the goods could be delivered so much more economically from Oswego than it could from Washington that we would probably be supplied by them in the future. I think Mr. Butchart was present at that conversation."

Upon cross-examination the witness testified: "I am not sure of the date of that luncheon. I have no way of fixing the date. I don't remember where the luncheon was held. I don't remember whether anyone was present beside Mr. Butchart, Mr. Coats and myself; there might have been. All I remember is of being there and all I remember was said is what I have testified to."

Testimony of W. H. George, for the Government.

Thereupon W. H. GEORGE was called as a witness on behalf of the United States and testified as follows:

"I am secretary and general manager of the Cowell Portland Cement Company with its plant at Cowell, Contra [203] Costa County, California, with its head office at San Francisco. I have been in that business since the company was organized in 1906 or 1907. I recognize this telegram and letter, the telegram confirmed by the letter, as my letter."

Thereupon the telegram and letter were marked Exhibit 104 and offered in evidence. The defendants objected to the letter and telegram not only (Testimony of W. H. George.)

on account of their date in 1915 but because it was incompetent, irrelevant and immaterial, but the court overruled the objection and an exception was taken and allowed and the letter and telegram were introduced in evidence and read to the jury.

Thereupon the witness identified certain correspondence between Carl Leonardt of the Southwestern Portland Cement Company and the witness and the same was offered in evidence marked Exhibit 105. To this correspondence the defendants by their attorneys objected upon the ground that it was correspondence between Carl Leonardt of the Southwestern Cement Company and the witness, that Carl Leonardt was not a director of the Oregon Portland Cement Company and that the correspondence is not competent, but the court overruled the objection and to this ruling the defendants excepted and the exception was allowed, and thereupon the correspondence was introduced in evidence and read to the jury.

Upon cross-examination the witness testified: "This correspondence covers the period from February 1 to February 7, 1916. I do not think I met Mr. Butchart about that time. I have seen Carl Leonardt quite frequently. I do not remember whether he was around at that time or not. I only met Mr. Butchart once. This was casually at the Palace Hotel when I was introduced to [204] him. I never met him after that time when I saw him at the Palace Hotel until here in Portland a year ago. When I met him at the Palace

(Testimony of W. H. George.)

Hotel it was a casual meeting. I was passing through the place and somebody introduced me to him and we passed the time of day—that is all. I do not know of any meeting of the cement manufacturers at that time at the Palace Hotel. I never at any time or place had any meeting with Mr. Butchart in which there was any discussion in regard to the affairs of the Oregon Portland Cement Company or in regard to how or where or at what price they should sell their produce. I have no correspondence with him about it. The correspondence with Carl Leonardt above referred to—I remember the matter that I wanted to talk to Mr. Butchart about at that time. I wanted to secure the sales agency for the Oregon Portland Cement Company for Portland and for Oregon but I never saw him about it; that was all that I wanted to see him about."

Testimony of C. W. Halderman, for the Government.

Thereupon C. W. HALDERMAN was called as a witness for the United States and testified as follows: "I live in Astoria and have lived there for twenty years. During that time I have bought and sold cement. Early in 1914 I purchased from the Henry Cowell Lime & Cement Company, the Mt. Diablo people. Later in February I purchased one lot I think from the Standard Cement Company. They are both California companies. I also purchased some Olympic cement in that year.

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(Testimony of C. W. Halderman.)

For the cement I have bought from the Henry Cowell Line & Cement Company I paid \$2.48. That was very early in the year. Later in the year I bought some cement from the Standard people for \$2.10 and I paid \$2.10 for the Olympic cement which I bought. I bought California cement until some time in [205] 1915 and then I bought from the Washington Portland Cement Company. At the time this change was made I was handling cement from the Riverside Cement Company and this company was selling cement to the Oregon Highway Commission for a concrete road. My arrangement with the Riverside people was advantageous because the cement went over our dock for this contract and we were allowed to take from the stock as it went over such cement as we needed. When that contract was completed or shortly thereafter the Riverside people withdrew from that market and I then purchased from the Washington people. The Riverside people would not sell to me any longer there. I continued to buy Washington cement until 1916, some time in June I think, when I received the first shipment from the Oregon Portland people. The occasion for this change was that the Washington people advised that they could no longer sell me cement in that territory. I was paying the Washington people \$2.30. For the purchase I made from the Oregon people I paid \$2.58. California cement came to us in all manners; some shipped from Portland by rail, some came by boat which

(Testimony of C. W. Halderman.)

was landed at our dock, some came from the Great Northern Steamship Company landed at Flavel and transferred across to Astoria. I know nothing of any cement taken from the boats at Flavel other than the shipments consigned to me. I cannot recall that I had any via Flavel after June, 1916 and I believe I had no shipments by boat after that date at Astoria. I recognize this letter marked Exhibit 106 as taken from our files.''

The letter was thereupon introduced in evidence and read to the jury.

"I also recognize this letter as taken from our files." [206]

The letter was thereupon marked Exhibit 107, introduced in evidence and read to the jury.

"I also recognize this letter as taken from our files."

The same was marked Exhibit 108, introduced in evidence and read to the jury.

"I also recognize this letter taken from our files."
The same was marked Exhibit 109, introduced in evidence and read to the jury.

"I am not sure whether the letter of June 30th from the Cowell Lime & Cement Company regarding prices at Warrenton indicates a change over the former price at Warrenton. I think the prices changed all over at that time, not only at Warrenton but at other points as well."

Upon cross-examination the witness testified: "My recollection is that the first cement I purchased from the Oregon Portland Company was

(Testimony of C. W. Halderman.)

on June 26, 1916, probably 110 barrels. My best recollection is that I paid \$2.58 but I had a contract with the Western Paving Company for three thousand barrels at \$2.10 and the Oregon Portland Cement agreed to sell me three thousand barrels at \$2.10 and possibly their first shipment was applied on that contract. I didn't receive the shipment of three thousand barrels at \$2.10 on that day but they agreed to fill this three thousand barrel order which I had with the Western Paving Company for \$2.10 and I was to deliver to the Warren Paving Company as they needed it. For all other cement I was to pay them \$2.58. I got a shipment of 150 barrels from the Oregon Portland [207] Cement Company to be delivered at Seaside. It was used in the construction of the High School at Seaside. I think it was a twocar order. I cannot tell you offhand what the price of that cement was nor the date upon which it was received. My recollection is that I was to pay \$2.35 but this is just a guess. After I commenced to buy from the Oregon Portland Cement Company I purchased a small amount from the Olympic which was used in the construction of the buoy station. I paid \$2.10 for that and all the rest that I bought I bought from the Oregon Portland and I think the purchase for the buoy station was prior to the time that I was purchasing from the Oregon. The price I paid the Oregon was \$2.58 with the exception of the three thousand barrels which they agreed to furnish at \$2.10. I

(Testimony of C. W. Halderman.)

don't recall buying cement from them in September at \$2.30. I got from the Oregon a commission of ten-ten, that means twenty. I was allowed a commission of 20 cents a barrel. The freight rate from Portland to Astoria at that time was to be exact 28½ cents. I think the freight rate to Warrenton was about 15 cents more, 15 cents a barrel. I got my cement from Portland in carload lots by rail. I also had an allowance for sacks. The \$2.58 was \$2.58 less 20 off and less an allowance of forty cents a barrel for sacks. The prices I have received from all cement companies have been uniform when I was able to purchase the cement. There were companies that wouldn't quote me at all but those who did quote me always quoted the same price with one exception."

Testimony of J. M. S. Hawthorne, for the Government.

Thereupon J. M. S. HAWTHORNE was called as a witness for the United States and testified as follows: [208]

"I live in Astoria; am assistant manager for George W. Sanborn & Sons, who are in the building material business and deal in cement and have dealt in cement since 1914. Our first purchase of cement was in July, 1914, from the Pacific Portland Cement Company, a California company. In 1915 we purchased from that Company and also from the Santa Cruz and Cowell companies, also

(Testimony of J. M. S. Hawthorne.)

California companies. In 1916 we purchased from the Pacific Portland and the Santa Cruz. We did not purchase from the Oregon Portland Cement Company until 1918 but got quotations from them in 1916. The only quotation we received I think was that dated July 26, 1916."

The witness thereupon produced a letter and contract from his files which he identifies as the quotation referred to and the same was offered in evidence marked Plaintiff's Exhibit 110 and he produces another paper which is offered in evidence and marked Plaintiff's Exhibit 111 and another paper which is marked Plaintiff's Exhibit 112, and a further paper marked Plaintiff's Exhibit 113, all of which papers are introduced in evidence and read to the jury.

"The notations in red ink and underscored were made by me in our office. The cement referred to in Exhibit 112 was delivered to us by water. The works are at Cement, California. I don't think that there was any difference between the water freight rate from San Francisco to Portland and the water freight rate from San Francisco to Astoria."

Upon cross-examination the witness testified: "The price under this contract, January, 1916, was \$2.30 per barrel f. o. b. carload lots at Astoria. The quotation from the same Company on June 29, 1916, was \$2.58 [209] f. o. b. dock or cars. I judge there was an advance in price. Looking at the contract I see that there is a clause which (Testimony of J. M. S. Hawthorne.)

does provide the Company has a right to raise the price. This clause is as follows: 'Seller may change the price of cement or price of sacks named in this contract, by giving notice to the buyer, provided seller shall protect any bona fide contract of resale for actual use in any certain building or construction work taken (at prices then in force) prior to the receipt of such notice, after inspection of such contract by the Seller.' I got cement from Santa Cruz by water landed at our dock. I had a concession of a wharfage storage charge of 10 cents a barrel and I had a dealer's commission of 10 cents a barrel. There were no other commissions during 1916. I also bought from the Pacific. We had probably bought from the Pacific before that time, June, 1916, but I don't recall any exact purchase. Cement bought from the Pacific also came by water and I had the same allowance for dockage from this Company. I don't recall any purchases from the Pacific for Seaside, Warrenton and Fort Stevens. My contract with the Santa Cruz was for Astoria only and possibly the immediate vicinity. The contract mentions Astoria only. The contract which I got from the Pacific was for use not only at Astoria but for other places in the immediate neighborhood. The first rail freight rate that I recall from Portland to Astoria was 7½ cents per hundred pounds. This was probably in 1914. This would be about 28 cents a barrel. This freight rate continued until the freight rates were largely increased by

(Testimony of J. M. S. Hawthorne.)

the United States Railroad Commission—I think in August a couple of years ago. I could not say what the freight rate is from Portland to Seaside nor the freight rate from Astoria to Seaside nor [210] from Warrenton to Portland nor from Astoria to Warrenton nor from Portland to Gearhart nor from Astoria to Gearhart. The letter in evidence from the Pacific Portland Cement Company says that the increased price was due to increase in freight rates. I don't know anything about this increase in freight rates. We accepted their statement regarding it and made no investigation."

Testimony of A. Gilbert, Jr., for the Government.

Thereupon A. GILBERT, Jr., was called as a witness on behalf of the United States and testified as follows:

"I am in the real estate, insurance and building materials business at Seaside, Oregon, and handle cement. In 1914 and 1915 I handled Santa Cruz cement, a California product. We have handled Santa Cruz cement ever since. We never handled any Oregon cement. A quotation was made to me by the Oregon Company but I did not buy any of their cement. This paper is an invoice from our files."

The same is offered in evidence marked Exhibit 114 and read to the jury.

"This letter also is from our files."

The same is introduced in evidence marked Exhibit 115 and read to the jury.

(Testimony of A. Gilbert, Jr.)

Upon cross-examination the witness testified: "In 1915 I got some cement by the steamer Daisy Freeman. It runs either from San Francisco or Santa Cruz to Portland. I usually got my cement from Santa Cruz by water from Portland. freight rate from Portland to Seaside as I recall it at that time was 15 cents a hundred. From Portland to Astoria is about 100 miles and from Astoria to Seaside is about 20 miles. I don't know anything about the freight rates on these steamers coming up from California except from hearsay. Usually I got my cement from Portland [211] and the price was based on the Portland price. I got quotations from the Oregon Portland Cement Company. They solicited my business. Some man came down to see me, one man was down in 1916 and they have been down there five or six times. I think there was one down there in 1914 and one in 1915 but I am not sure. I don't know who he was: he solicited my business but I didn't give it to him. At that time I was content with my relations with the Santa Cruz."

Testimony of F. S. Clark, for the Government.

Thereupon F. S. CLARK was called as a witness on behalf of the United States and testified as follows:

"In 1914 and 1915 I was purchasing agent for the Spokane, Portland & Seattle Railway with an office in the Pittock Block in Portland. I bought cement from all the different companies, Washing(Testimony of F. S. Clark.)

ton and California at different times. I continued as purchasing agent until October, 1917, I couldn't say from whom I purchased cement after 1916 or after April, 1916. There was a change; from some of them we couldn't buy. I think the Washington companies withdrew from the territory and some of the California people did, too. I recognize this letter. It was received by me in the ordinary course of business."

The same was offered in evidence marked Exhibit 116 and read to the jury.

"While I was purchasing agent quotations were usually the same from all companies."

Upon cross-examination the witness testified:

"I bought cement for five railroads; the Spokane, Portland & Seattle, United Railways, Oregon Electric Railway, Oregon Trunk Railway and Pacific & Eastern Railway. They all belong to the S. P. & S. system. Pacific & Eastern Railway runs out of Medford east; the Spokane, Portland & Seattle runs from Portland to Spokane, most of the way through Washington. I did not buy from the Oregon Portland Cement Company prior to July, 1915. I think it was 1915; I am not able to say. I don't remember the date; it may have been not until July, 1916. The cement I purchased from the Oregon Portland Cement Company was used in Portland on the Oregon Electric Railway making repairs to tracks used in putting down culverts, relining tunnels, repairing tunnels;—anything of that description, and used on all the railroads. It

(Testimony of F. S. Clark.)

was used on the Spokane Portland & Seattle between Portland and Spokane in Washington during 1916. I think I paid \$2.20 or \$2.30—both probably; in 1915 I paid \$2.30 in August. It was \$2.30 when delivered on cars and \$2.20 f. o. b. dock; some companies charged 10 cents for loading on the cars and others 8 cents. Sometimes we bought f. o. b. cars, sometimes on the dock. In 1916 we were paying \$2.10 and \$2.20 in January and May. For different shipments in the same month, both in the month of January, we paid \$2.10 and \$2.20. It was bought from the Cowell Lime & Cement Company and the Washington Portland Cement Company. I presume I bought later on in 1916 as I was buying all the time. I don't remember the price; all the companies charged practically the same price. I got their quotations. As our railroad was a steam railroad we got a lower price than the dealer I presume. I never asked what the dealer's price was. In Exhibit 116 the Washington Company gives as the reason for not supplying us with cement the extreme shortage of cars. I couldn't say as to that; I had nothing to do with it. There was at different times in 1916 a shortage of cars. I heard complaints of it. Whether it was actually so or not I [213] couldn't say. That must be ascertained from the Traffic Department. Shippers of cars had preference in that matter in shipments. Cement was usually delivered at the dock in Portland. We bought in such quantities as we had occasion to use. When delivered in car(Testimony of F. S. Clark.)

load lots it was delivered some to the dock or to drays if we wanted to ship it around town. If we wanted to ship it around town we had to pay the drayage. I don't remember what the drayage was. I couldn't say whether the drayage was uniform. I don't think so; I think it depended upon who we got to handle it."

Testimony of F. W. Erlin, for the Government.

Thereupon F. W. ERLIN was called as a witness on behalf of the United States and testified as follows:

"I am secretary and sales manager of the Pacific Portland Cement Company whose factory is at Cement, California, and my place of business is at San Francisco, California. Cement is about 50 miles east of San Francisco and about 50 miles from the dock. In shipping cement from the California plant to a point in Oregon by water it would be brought by rail from our plant to the dock at San Francisco and then by water to Portland. If shipping from Cement, California, to Corvallis, Oregon, it is possible that we would load at the mill of the cars, transfer it by rail 50 miles to the dock. That would be one method of shipping the cement. The cement might also move by rail all the way to Corvallis. If shipped by water when it reached San Francisco it would be loaded on the boat, brought to Portland and reloaded on cars to be hauled to Corvallis. If it didn't come by water it would come direct by rail from our mill to Corvallis over the

Southern Pacific. I have occupied my present position with the Pacific Portland Cement Company since 1907. I recognize this letter with telegram attached. I wrote the [214] letter and the telegram."

The same were offered in evidence marked Exhibit 117 and read to the jury.

"I also recognize this paper as from our files. I prepared and signed it."

The paper referred to is offered in evidence marked Exhibit 118 and read to the jury.

"I also recognize this paper as from our files and signed by me."

The paper referred to is offered in evidence marked Exhibit 119 and read to the jury.

"I also recognize this paper as from our files." The paper referred to is offered in evidence marked Exhibit 120 and read to the jury.

"I also recognize this letter; it was written by me."

The letter is offered in evidence marked Exhibit 121 and read to the jury.

"I also recognize this as one of our documents."

The instrument referred to is offered in evidence marked Exhibit 122 and read to the jury.

"I recognize these telegrams and this letter. I think the pencil memorandum on the left on the letter is in the writing of the manager of our Portland office."

The correspondence but not the pencil memorandum, which was identified by the witness, was of-

(Testimony of F. W. Erlin.) fered in evidence marked Exhibit 123 and read to the jury.

Upon cross-examination the witness testified:

"I personally know Clark M. Moore; have known him probably six or seven years at least. When I first met him he was connected with the Colorado Portland Cement Company. [215] I remember meeting him in connection with the Portland Cement Association. I don't think he was ever an officer of the Association. He may have been; I don't recall it. If the records show that at one time he was one of the executive committee that would not make him an officer. I met him in New York and San Francisco. I think he was representing the Colorado Portland Cement Company. I don't know whether he came back to Portland after he received the letter from me to the Oregon Portland Cement Company addressed to Clark M. Moore at Denver, in which I asked him when he comes back to Portland to come via San Francisco. I don't recall whether he came to Portland after receiving that letter or not. I couldn't say whether he came via San Francisco on that particular trip. I cannot say whether I had any talk with him in San Francisco at that time if he did come that way. I have had several talks with him at different times. I have had some talks with him after he became sales manager of the Oregon Portland Cement Company in San Francisco and in Portland also. In these talks we may have discussed the territory in which the Oregon Portland Cement

Company should sell its product and the prices at which they should sell. We discussed general business and quite likely we discussed territory and prices. I have no recollection as to when any of these conversations took place nor who was present. There were never any discussions of these matters at meetings of the Portland Cement Association. If I had talks with Clark Moore about these matters it was in private conversation. Other parties may have been present; I don't recall. I don't know who the Bellingham concern is that is mentioned in one of these letters. I don't know whether we did business with them or not. I don't [216] remember the name at all. Our business in Washington was done in part from the Portland office. Our agent in Portland was Mr. Statter. I don't recall how it came about that I wrote this letter, Exhibit 122, nor do I recall anything about the cause of writing the letter Exhibit 118. I don't know whether I got any answer from Clark M. Moore. I don't know where these letters came from. The Government presumably got them from our files. I was not present when they were taken. They never came from our files; they must have come from Mr. Moore's files, addressed to him at Denver. The other letters which were introduced in evidence quite likely came from our Portland office files. Some of them are carbons or copies of letters. They presumably came from our Portland files too. I think our Portland office was called upon to furnish their files. I don't think I

said I had any talk with Clark M. Moore regarding prices or territory. I said I discussed general business conditions with him. If I did have any talk with him I did not make any agreement with him in regard to the territory in which or the prices at which cement should be sold. We made prices upon our own product at various points from time to time which I called list prices. They were naturally quoted in response of any inquiry. They were prices made by ourselves without consultation with any other people. We made our own prices on our own products. In shipping from our plant to Portland we shipped either by rail or by water. Most of our cement was brought in by water and rail, by rail to the dock at San Francisco and by water from San Francisco to Portland. If the cement was to be delivered in the southern part of the state it would guite likely come by rail. controlling feature as to whether [217] it should be transported by water or by rail was the cost of transportation. I am not familiar enough with freight rates to say at what point the rail and water transportation would be cheaper and what point the rail transportation would be cheaper in Oregon. I had no agreement with anybody in regard to the prices at which we should sell our cement or the territory in which we should sell the same. We had no agreement with anybody in regard to where they should sell their cement or the prices at which they should sell their cement. I don't recall the circumstances about that Bellingham matter in

which I say: 'As we understand the present list price of Washington mills is \$2.30 f. o. b. Bellingham. We have telegraphed you that it is quite in order for you to quote as you desire.' It is likely that I felt that that was the price which we wanted for our cement.'

Testimony of E. W. Charles, for the Government.

Thereupon E. W. CHARLES was called as a witness for the United States, and testified as follows:

"In 1914, 1915 and 1916 I was Chief Clerk in the Bureau of Purchases and Stores in the City Hall of Portland, Oregon, employed by the City of Portland. When bids came in for cement I opened them at the proper time, tabulated them and passed them on to the purchasing agent. I recognize this group of papers. It is a tabulation of bids made by me for the city of Portland."

The papers were offered in evidence marked Exhibit 124, those of them which antedate 1916, subject to the objection of the defendants that they were incompetent and irrelevant because they were prior to the time of the organization of the Oregon Portland Cement Company. They were all marked Exhibit 124 and read to the jury.

"This is another tabulation made by me of bids [218] received by the city."

The same was offered and received in evidence, marked Exhibit 125 and read to the jury.

"This is still another tabulation made by me."

(Testimony of E. W. Charles.)

The same was offered in evidence marked Exhibit 126 and read to the jury.

"This is another tabulation made by me of bids received by the City of Portland."

The same was offered in evidence marked Exhibit 127 and read to the jury.

"This is another tabulation of bids received by the City of Portland,—no bids received by the City of Portland. There doesn't appear to be any tabulation."

The same was offered in evidence marked Exhibit 128 and read to the jury.

"This paper is also cement bids received by the City of Portland."

The same was offered in evidence marked Exhibit 129 and read to the jury.

The cross-examination was waived.

Testimony of W. J. Morris, for the Government.

Thereupon W. J. MORRIS was called as a witness on behalf of the United States and testified as follows:

"I live in Portland and have lived there for about thirty years. I am purchasing agent for the Portland Railway, Light & Power Company and have been for eight years. As purchasing agent I bought cement for this company. In 1915 I bought from Balfour-Guthrie & Company, Cowell, Santa Cruz and the Pacific and other companies—I am not quite sure. In 1916 I bought from Balfour-Guthrie, Santa Cruz and from

(Testimony of W. J. Morris.)

the Oswego Cement Company. In 1915 the price quoted by these various companies was \$2.30 and \$2.35, and [219] I think, two cases at \$2.20. In 1916 we paid \$2.30 and \$2.20. After about June, 1916, we didn't buy any cement from anyone except the Oswego people. I had opportunities to compare prices; my recollection is their price was the same as other companies."

Upon cross-examination the witness testified:

"After June, 1916, we felt we should purchase from the Oswego plant as they were a home industry and their price as good as that of any other company. I bought some in 1916 at \$2.20. This was ten cents lower. This was the gross price you understand; they made the same allowance as other companies on sacks though I think some of the companies only allowed $7\frac{1}{2}$ cents if I remember right but the Oswego company allowed ten cents. I think they gave us a better price in 1916. I purchased two carloads if I remember at \$2.20, ten cents allowance for sacks for forty cents a barrel. $7\frac{1}{2}$ cents is thirty cents a barrel. I think all but the Oregon company allowed $7\frac{1}{2}$ cents for sacks."

Thereupon, under a stipulation, the attorney for the United States read into evidence the testimony of R. A. KLEIN, given upon the former trial of this case, wherein the said Klein, a witness called on behalf of the United States, testified as follows:

Testimony of R. A. Klein, for the Government.

"I live in Salem, Oregon; am secretary of the Oregon State Highway Commission; have held this position since July, 1918. Prior to that time I was Division Engineer for the Commission from January, 1918, to July, 1918. Prior to that time during the year 1907 I was employed as resident engineer in charge of field work. In 1914 I was employed by the Highway Commission of Multnomah County in [220] constructing the Columbia River Highway. In 1915 and 1916 I was employed on road construction work in Skamania County, Washington. There was a State Highway Commission in 1914. I was not familiar with the price of cement in 1914 nor in 1915 nor in 1916. I was subpoenaed to bring with me the records of the Commission as to prices bid upon cement in 1914, 1915 and 1916. I have these files with me. I was not in the service of the Commission in 1916 at the time this correspondence was had. It was taken by me from the original files of the Oregon Highway Commission."

The witness produces a number of papers which are offered and introduced in evidence, marked Exhibit 137 and read to the jury.

Testimony of George McDonald, for the Government.

Thereupon GEORGE McDONALD was called as a witness on behalf of the United States and testified as follows:

(Testimony of George McDonald.)

"I am at present secretary of the Oregon Portland Cement Company and have been since December 22, 1915."

Thereupon the witness identified certain papers produced by the witness marked Exhibit 131 and the same were introduced in evidence and read to the jury.

"This letter, Exhibit 131, has the letter 'H' on the left-hand corner and I presume it was written, by Mr. Hollister who was in the employ of our Company, the same party who was transferred from the Sales Department in March."

Thereupon this letter identified by the witness was introduced in evidence marked Exhibit 132 and was read to the jury.

"Mr. Robson mentioned in this letter is the gentleman who was in charge of the building material department of Balfour-Guthrie in 1916." [221]

Thereupon a certain telegram addressed to Clark M. Moore and signed by J. E. Moore, dated August 22, 1916, was offered in evidence marked Exhibit 133 and read to the jury.

Thereupon a telegram to Clark M. Moore signed by J. E. Moore dated August 29, 1916, marked Exhibit 134 was introduced in evidence and read to the jury.

"In 1916 until about July 20th J. E. Moore was one of our salesmen—traveling salesmen in the country. After that date he looked after the sales in the office. He is a brother of Clark M. Moore."

Testimony of J. E. Moore, for the Government.

Thereupon J. E. MOORE was called as a witness for the United States and testified as follows:

"I went to work for the Oregon Portland Cement Company about the first of June, 1916. Clark M. Moore is my brother. About the first of June I went on the road selling cement for them as a traveling salesman. I was assistant sales manager in the office later on. I identify this paper as a copy of a telegram which I sent my brother."

The same was marked Exhibit 135 and introduced in evidence and read to the jury.

"I remember what it was of which I notified all the dealers in less than an hour as set forth in that telegram. It was to get them to handle the Oregon Portland cement, to get them to sell it as dealers. Clark and I had talked over the idea of getting more dealers to handle our cement. At the time of our talk there were only three dealers in this city handling it and we thought it would be a good idea to get more dealers. I don't recall having any communication with my brother in San Francisco, either by telegram or long distance telephone to which this telegram was in answer. I recognize the paper which you show me. [222] It is a carbon copy of a letter."

The same was introduced in evidence, marked Exhibit 136 and read to the jury.

"I don't know how long at this time my brother had been in San Francisco. This letter, dated August 12, 1916, was addressed to him at the Cliff

(Testimony of J. E. Moore)

House and on the 15th apparently I telegraphed him aboard the Southern Pacific train leaving San Francisco at four o'clock that day. I don't think he was in Portland between the date of the letter and the date of the telegram which I sent. Hansen mentioned in the letter was a salesman for one of the California companies. He was a man that I wanted to eliminate."

Testimony of C. T. W. Hollister, for the Government.

Thereupon C. T. W. HOLLISTER was called as a witness on behalf of the United States and testified as follows:

"I am with the Oregon Portland Cement Company. I was first here on January 28, 1907. My last continuous service began in September, 1915. In the early part of 1916 I was in charge of the sales office. In the latter part of 1916 I was on the road for the Company, commencing in August. Since 1916 I have been continuously with the Company in the sales office and on the road. I recognize this carbon copy of letter as one that I wrote."

The letter was offered in evidence marked Exhibit 137 and read to the jury.

"I recognize this letter as one which I received from Mr. Clark M. Moore."

The letter was offered in evidence marked Exhibit 138 and read to the jury.

"I recognize these papers—that is a letter sent by me to Mr. Clark Moore and his answer to it." [223]

The papers identified by the witness were introduced in evidence, marked Exhibit 139, and read to the jury.

"I recognize this paper as a telegram received by me from Clark M. Moore."

The paper was offered in evidence marked Exhibit 140 and read to the jury.

"I recognize this paper as a copy of a letter written by me to Clark M. Moore."

The same was offered in evidence marked Exhibit 141 and read to the jury.

"Mr. Statter is a local representative of the Pacific Portland Cement Company, a California Company. I recognize these letters as letters written by me and by Clark M. Moore."

The letters identified by the witness were offered in evidence marked Exhibit 142 and read to the jury.

"At that time Mr. Robson mentioned in these letters was in charge of the building department of Balfour-Guthrie & Company and Mr. Statter is the same Mr. Statter who is local representative of the Pacific Portland Cement Company. Golden Gate is a California cement, manufactured by Pacific Portland Cement Company. I recognize this letter as one written by me to Clark M. Moore."

The letter identified is offered in evidence marked Exhibit 143 and read to the jury.

"All the cements mentioned in this letter except Olympic, are California cements. Olympic is a

Washington cement. I recognize this letter as one received by me from Mr. Clark M. Moore."

The letter identified by the witness was offered in evidence marked Exhibit 144 and read to the jury.

"I recognize this as a carbon copy of letter written [224] by me. The pencil notation in the corner was made by me for Mr. Clark Moore's attention."

The letter identified by the witness was offered in evidence marked Exhibit 145 and read to the jury.

"I recognize this communication to the Oregon Portland Cement Company and my answer to it."

The papers identified by the witness were offered in evidence marked Exhibit 146 and read to the jury.

"Examining that paper again, the carbon shows General Sales Manager, 'M' and 'W' in the corner The letter was dated June 10, 1916. Mr. Clark Moore was General Sales Manager at that time. We had a Mr. Wellman at that time but whether the 'W' refers to Wellman or the 'M' refers to Clark M. Moore I couldn't tell you. As a rule the first letter on a letter of that kind is the initial of the person dictating, and the second letter the initial of the stenographer who takes the dictation. That was the practice of our office. Our stenographer at that time I think was a Mr. Davidson. I also identify this paper as a carbon copy of a letter taken from the Oregon Portland Cement Company's

office. The same initials appear on it 'M' and 'W.' I don't question it is Mr. Clark Moore's letter; it is dated June 16, 1916, and he was here at that time and was General Sales Manager."

The paper referred to by the witness was offered in evidence marked Exhibit 147 and read to the jury.

"I recognize these letters as from our file—the Oregon Portland Cement Company's file. That answer was dictated by me. I am trying to think of a stenographer whose initials were 'W.' I think we did have one."

The letters referred to were offered in evidence [225] marked Exhibit 148 and read to the jury.

"When this case was on trial before I was a little confused on the rate question because I had not looked it up. When we went on the market we had a tariff of 81/2 cents to Seattle and Tacoma and a 10 cent rate to Aberdeen and Hoquiam. There was a new supplement issued on July 1st. We petitioned the carriers to give us, meantime, an 81/2 cent rate to Tacoma and Seattle, against their 5 cent rate from Bellingham and Concrete, and they came out on July 1st with a 10 cent rate to Seattle and Tacoma, Aberdeen and Hoquiam and a 10 cent rate from Bellingham and Concrete to Vancouver, Washington and Portland against the old blanket rate of 8½ cents from Bellingham and Concrete to Portland. This 8½ cent rate to Portland was in effect when we came on the market, June 9, 1916, when our first car was shipped. I think this

rate was published on the 6th of April. It was in effect when we came on the market. I cannot say without looking it up whether it was published on the 6th of April. I can identify these letters which you now show me."

The same were offered in evidence marked Exhibit 149 and read to the jury.

"I also identify this letter as having been written by Mr. Clark M. Moore and as having come from our files."

The same was offered in evidence marked Exhibit 150 and read to the jury.

"I am the same Mr. Hollister referred to in that letter, the only one who was working for the Company."

Upon cross-examination the witness testified:

"I have some recollection about that clause in the letter exhibit 137, in which I say: 'We called on Mr. Maher, [226] Sales Manager.' I knew the local representatives of the cement companies in a casual way and as an act of courtesy to the representatives in Portland I wanted them to meet Mr. Clark as our new Sales Manager. It was a social call on April 19th, almost two months before we shipped our first car. In the latter part of that letter I write: 'We will see Mr. Statter.' That relates to the Salem bridge. It is the usual custom with cement companies when a large project is coming up like the Salem bridge was, to do all we can to bring about a concrete bridge, and if the contract goes for concrete against steel or any other

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(Testimony of C. T. W. Hollister.)

type of bridge construction then it is every cement company for himself, but the steel interests and the timber interests are fighting the cement interests all the time, and if a contract went for a steel bridge, which this one did, and we got the order later, some 5000 barrels,—if it went to concrete it would have run between 35,000 and 40,000 barrels of cement. We didn't get it a concrete bridge. The footings are concrete and the superstructure steel. As I said before all cement companies unite upon contracts of this character to get it turned to concrete. Then after the contract is made for concrete every man works for himself. There is competition between the cement industry as against steel and other industries in building such as brick and tile, terra cotta and all that. In this letter, Exhibit 138, there is some mention about Olympic. The letter speaks for itself. The Olympic had some contracts that they were completing; that is all I know about it. I just made some reports to Mr. Clark Moore to call his attention to conditions existing in Portland at that time and to keep him advised. In Exhibit 139 there is some mention about Grandview and Echo. [227] The Construction Company, as I understand it, was a subsidiary company of the Warren Construction Company and were down along the Des Chutes River in central Oregon after the irrigation work that was going on up there. There was a Grandview irrigation project going on in central Oregon, a clipping in the paper about it, and I wrote Mr.

Clark Moore stating that Grandview was in our territory. That is just east of Des Chutes over in central Oregon. There is another Grandview in the state of Washington. To reach Grandview, Washington you have to go to Pasco and go up the Northern Pacific into Central Washington. To this Grandview the rates were less from the eastern Washington mills and less from the western Washington mills than from our mill, and therefore Mr. Clark Moore had misunderstood me about Grandview and he thought I was speaking of Grandview, Washington when I was really speaking of Grandview, Oregon. In Exhibit 141 there is mention of the Oregon City reservoir. This was handled directly by Mr. Wellman who made his reports to me, and at the same time made a report to Mr. Clark Moore, and in this exhibit I was quoting Mr. Wellman. There is something also said in that letter about 'In talking with Mr. Statter to-day he stated that it was a bluff on the part of John Ash.' John Ash was a contractor at Corvallis, but had a letterhead marked as a building material company and he would try to get his material for his construction work such as cement on the basis of a dealer. 1 don't think I ever spoke to Mr. Statter about it. I worked through another channel to find out the attitude of Mr. Statter and others. Something is said in these letters about a fight between concrete and bitulithic methods. It is a fight between cement interests and the soft pavement, black top or bitulithic. [228] I don't think I ever spoke to

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(Testimony of C. T. W. Hollister.)

Mr. Statter about Ash; I think I took the matter up with Robson, sounded out Robson and he would sound for me. At the date of those letters the Oregon Portland Cement Company was marketing its product exclusively through dealers because the dealer is established in business and as a rule has a bank account. The contractor may go broke on a piece of work and the cement company or the material company lose money. At this time when we entered this field we had a very limited capital and were compelled to sell to the man who could take advantage of the cash discount and pay us promptly, in order to carry on the business. We sold no cement in Portland except to dealers, railroads and the United States Government and out in the country we pursued a similar policy. We naturally sold to that dealer nearest home where we could get our returns quickly. The contractor's account, unless he has a strong backing, is a critical account. We didn't sell to the City of Portland in 1916 or make them any quotation or bid. Mr. Clark Moore's letter, in which he says that we are furnishing cement to the City of Portland, means that the dealers were selling the City of Portland, our dealers selling our cement, but we directly had nothing to do with the City of Portland. I don't find the letter to which Mr. Clark Moore's letter to the Astoria Fuel & Supply Company is in answer. think this letter was one of Charlie Halderman's company roars about the Sanborn Company having a lot of cheap cement, but I know nothing about

that letter. In Exhibit 143 I undertook to tell Mr. Clark Moore about the stock of cement in Portland. We made it a practice once or twice a month to go to all the wharves. The California companies at that time were [229] shipping practically all their cement to Portland by steam schooners. They got a low rate by lumber carriers, \$1.50 a ton, to bring cement here from bay points in California and they would load the wharves, starting along in February or March, and we made it a practice to keep in touch with the amount of competitive cement in the field; visited the wharves, warehouses on the tracks and as far as we could keep in touch with the amount of cement shipped in from California. We would go to the Merchants Exchange and have them give us reports on the movement of cement from California in order to check up the tonnage in and out. This is a practice which has been in 'vogue ever since the cement industry has been in existence. Watch your competitor, keep in touch with him all the time, follow him up, see what he is doing, what he is selling, get his price directly and indirectly, any way you can, meet it and if necessary cut it. In this letter I also say that "Mr. Statter is drawing on our stock at Oken's warehouse to-day to fill his requirements for Hassam pavements." Sometimes the California mills, especially that year, ran out of cement due to carriers not getting up, congestion on the railroads or lack of transportation facilities. Then they would buy our cement and keep their contracts going, possibly

a city contract. This was a city contract and was called cement pavement and they bought cement from us. The Pacific Cement Company bought this cement from us and paid us the full market price. In the same letter I say that Balfour-Guthrie ran an advertisement every other day, on the 10th they advertised Olympic and on the 12th Oregon. This advertisement was in the Daily Record or Abstract, a paper published in Oregon and sent through Oregon and Washington. [230] Therefore they would carry the Olympic brand and the Oregon brand; the Olympic brand was from their mills in Washington, at the same time they carried the Oregon brand in Oregon; they were one of our dealers in Portland. In 1916 the cement test for the City of Portland was 28 days. In San Francisco at that time they required cement to have been in actual use in the City for three years before it could be used for public work. In Exhibit 144 I wrote something about the Gresham matter. Trucks would come in from Gresham with loads of vegetables and produce from the ranches out there; they would pick up cement and take it to Gresham, and a report came in that the Santa Cruz was allowing this back haul to Gresham 19 cents, and this I reported to Mr. Clark M. Moore. I do not recall anything about the reference in one of these letters to a letter of Mr. Fuller. The reference in the letter to a list of contractors who will bid on the Portland postoffice refers to the new Portland postoffice to be built and Mr. Clark M. Moore, as you will

'notice, on his arrival in Portland sent out letters to the entire list asking for the privilege of quoting. In one of these letters in which Mr. Clark Moore speaks about the Astoria condition I think he is referring to the price there of \$2.58. I do not know anything about the application of Raymond P. Smith mentioned in one of these letters. In regard to the matter of the Auburn Furniture & Hardware Company, that was the matter in which Mr. Elliott asked a price for Oregon Portland cement to him as a matter of curiosity. We couldn't sell cement to him as the freight rate from Bellingham and Concrete to Auburn was 5 cents and our rate on July 1st was 10 cents a hundred. Cement weighs 380 pounds to the barrel, four sacks to the barrel. Ten cents a [231] hundred means 38 cents a barrel; five cents a hundred means 19 cents a barrel. In Exhibit 146, the letter to the Chehalis Brick & Tile Company and the answer to the same in which it is said that it is not our intention to establish any jobbing agencies; I would say that our company has no agencies. A dealer buys in carload lots, stocks up and resells. An agent takes the cement on consignment and sells and the Company is responsible for his acts. Moreover the Chehalis Brick & Tile Company is a ceramic concern. Ceramic concerns are competitors in the cement business and to give such concerns a dealer's price would give him a better chance to land the work. The Aberdeen Manufacturing Company was a small planing mill at Aberdeen. Mr. Wylie was

the manager. He is the same man who was on the stand. I have known him for a number of years. knew him when he was in the ceramic business and his account was not to my liking and I gave him an evasive answer and held him off. The correspondence beteen the Company and F. R. Clark dated 1916 was written on April 25th, about two months before we made our first shipment. We didn't have any cement manufactured; we didn't know definitely what our tonnage would be or what our capacity would be. We could not at that time not knowing the cost of manufacture, make a quotation. In this letter I refer to the rate question as not having been settled. We were hoping to have an 8½ cent rate, the same rate that we had to Seattle and Tacoma, to apply to intermediate points. Our distance to Chehalis was about 90 miles and from Bellingham and Concrete is about 190 miles. We hoped to get the Bellingham and Concrete rate advanced or our rate reduced. We had a rate from Oswego to Centralia at that time. I hadn't looked up this [232] question when I testified upon the former trial of this case. I wrote to John Hughes on May 16, 1916, when we had received a letter from him saying we would have our representative call on him. I was the representative but I cannot recall that I called upon him. My attention is called to Exhibit 150, a letter from Mr. Moore to the Kleinsmith Hardware Company. It refers to some order. This is June 8th; I have tried to ascertain something about taking the order from Mr. Kleinsmith

(Testimony of C. T. W. Hollister.)

during March, but I have been unable to locate it. He visited our plant before it was in operation and he and Mr. Aman Moore became friendly and I don't know whether he gave Mr. Aman Moore an order or not. There was a tentative arrangement made anyway that he was going to handle our cement at Baker. This was made by Aman Moore. I was over in Baker in March but whether I picked up Mr. Kleinsmith's order or confirmation verbally I cannot recall, nor can I find any evidence in our files that I did so.''

Upon redirect examination the witness testified:

"I wouldn't have you infer from what I have said about the Kleinsmith matter that Mr. Clark Moore was mistaken in writing the letter which he wrote. I cannot tell how long Mr. Clark Moore remained sales manager of the Oregon Portland Cement Company. I think he remained until 1917 but I cannot tell the period at which he ceased to be sales manager. I have been active in assisting the defense of the trial of this case. Referring to Exhibit 141 I meant to say that I think, I don't remember talking to Mr. Statter. The letter says 'in talking to Mr. Statter to-day he stated that it was a bluff on the part of John Ash,' but I don't remember talking to Mr. Statter. I [233] wouldn't say that I did or did not talk to him; I doubt very much whether I did talk to him. I should not have said that Mr. Elliott used the term 'that it was merely a matter of curiosity.'

(Testimony of C. T. W. Hollister.)

He made the statement here in the courtroom when he was a witness that he wanted to find out what the price was. In selling prior to July 1st our freight rate was 10 cents a hundred, I should say that up to July 1, 1916 we had an 8½ cent rate to Seattle and Tacoma. Auburn is between Seattle and Tacoma. In testifying about the Chehalis Brick & Tile Company on the basis of an agency I said that our company was opposed to establishing agencies; we have always been opposed to appointing agents, this was one of the reasons. Upon having my attention particularly called to Exhibit 146 I note that the letter from the Chehalis Brick & Tile Company does not say anything about an agency."

Upon recross-examination the witness testified: "When I was asked by the attorney for the defendants I understood I was asked about Mr. Clark Moore's letter, not about the letter from the Chehalis Brick & Tile Company."

Testimony of W. C. Smith, for the Government.

Thereupon W. C. SMITH was called as a witness on behalf of the United States and testified as follows:

"I am purchasing agent for the Northwestern Bridge & Iron Company. In 1915 and 1916 I was purchasing agent for the Northwest Steel Company and prior to that time I was with the Brayton Engineering Company as office manager and purchasing agent. I bought cement in the

(Testimony of W. C. Smith.)

course of my duties in 1916, bought from different companies where we could secure the best prices. We could get once in a while a difference in the price on account of the cartage they said, but prices were practically all the same. In June, 1916 we bought cement from the Pacific Portland Cement [234] Company. I remember that the Oregon Portland Cement Company came upon the market in April, May or June of 1916. The Oregon Company made a higher price than others or the same price; the price was higher on account of the cartage. Several of their salesmen, Mr. Hollister personally, talked to me about this matter. I offered Mr. Hollister some cement business on the same price at which I was buying from the Pacific Portland Cement Company and he said he couldn't meet this price. Afterward we were unable to buy any more cement at the old price from the Pacific Portland Cement Company."

Upon cross-examination the witness testified: "We bought our cement from various shippers who represented the various California people. We were located in South Portland and we got a lower price from some California companies because of the cartage. We bought from the shippers and the shippers made the arrangement with the man who was doing the carting. In a good many cases the shippers and cartage people were the same. We bought from James A. C. Tait. After we tried to buy some from the Oregon Portland Cement Company we had to pay more to the

(Testimony of W. C. Smith.)

Pacific Portland Cement Company. This information came to me from Mr. Tait, the man from whom I was buying cement. He told me that he would be unable to deliver any more cement to me at the present prices as he had been notified by the Cement Company that he couldn't have any more cement if he delivered to us at that price. Mr. Tait, as I understood, was a regular dealer in town and represented the Cement Company. The difference in the price was approximately 5 cents a barrel. Whether there was or was not a Teamsters' Association in Portland I couldn't say; they [235] had tried to form one before that but whether it was in operation at that time I cannot say. I don't know about that Association trying to divide the city into zones. We deal entirely with cement companies. We didn't do anything with trucking companies. I don't know whether the city was divided into zones at that time or whether it was on the zone system or not. Upon the former trial of this case I testified and testified upon this question as follows: 'Q. Did that association undertake to divide the city into zones at different places? A. Whether the teamsters did that or the cement companies did that I don't know. Q. It is a fact that was done? A. It was done; they were delivered on a zone system. Q. Wasn't everything delivered on a zone system, whether cement or anything else? A. Sand and gravel were, but what other articles I don't know. Q. Sand and gravel were? A. Yes, sir.

(Testimony of W. C. Smith.)

Q. And cement was? A. Yes, sir.' I was also asked about lumber and said that I got our lumber from the mill. What I testified to before was correct. As I remember we were under a certain different price. I suppose they meant that by zone and this zone regulated the price for the delivery of sand, gravel and cement. I cannot say whether Mr. Tait personally carried any stock of cement or whether the Pacific Portland Cement Company had it on the dock, but he had it right in his place there. He handled it himself and we bought it direct from him and made our payments to Mr. Tait; I am not sure of this—the matter of payment. Oftentimes agents have it billed direct from the Company which they represent. I had a special rate from Mr. Tait for the cement delivered and he was the man who told me that he couldn't deliver any more at that price. He said he cut the price on account [236] of the hauling and that was all the difference there was between the price of the Pacific and the price of Oregon cement."

Testimony of W. D. Skinner, for the Government.

Thereupon W. D. SKINNER was called as a witness on behalf of the United States and testified as follows:

"I am traffic manager of the Spokane, Portland & Seattle Railroad; have been since January, 1913. This road is commonly called the North Bank road. Prior to the first of March, 1915 the rate on cement

from Spokane to Portland was 25 cents a hundred pounds."

Thereupon the witness was interrogated in regard to putting in a special rate upon cement in order to get the haul of the cement for the interstate bridge, and to this testimony the defendants by their attorneys, objected upon the ground that the same was irrelevant and incompetent inasmuch as the testimony related to a freight rate and to the efforts of the cement companies of California and western Washington to prevent this freight rate being established and not to interstate commerce, and because it does appear that the Oregon Portland Cement Company had nothing to do with this matter nor had the defendants or either of them; but the court overruled the objection and allowed the testimony to be introduced, and to this ruling the defendants excepted and the witness testified subject to such objections and exceptions, as follows:

"In the hopes of securing the cement for the interstate bridge, early in March, 1915 I undertook to put in a rate of $13\frac{1}{2}$ cents per hundred pounds from Irwin, a point near Spokane, to Portland. I had the power to name this rate as traffic manager. I identify this slip of writing dated March 6, 1915; it is in my handwriting. After I had written it I handed it to a representative of [237] the cement plant at Irwin, or to Mr. Swigert at Portland."

Thereupon this paper, over the objection and exception of the defendants above mentioned, was offered and introduced in evidence, marked Exhibit 151, and read as follows: "S. P. & S. will publish rate 13½ cents on cement c/1 from Irwin, Washington to Vancouver, Washington and Portland, Oregon, if Irwin plant secured contract for interstate bridge cement. W. D. Skinner, F. T. M. Portland, Oregon, 3/6/15."

"c/1 means carload, T. M. means traffic manager. I afterwards learned from the Spokane cement people that they had secured this contract. I identify this letter as a carbon copy of letter received by me from them in that connection."

This carbon copy was offered in evidence over the objection and exception of the defendants to all evidence of this character as above stated and was read to the jury, marked Exhibit 152.

"I also identify this paper as the original answer which I received from these people."

Thereupon two telegrams were offered in evidence marked Exhibit 153 and over the same objection and exception of the defendants were introduced in evidence and read to the jury.

"Objection to the publications of this rate had come from a good many sources, some from other cement companies and good many interests and I think at that time I discussed the question with our president, Mr. Gilman, and concluded to hold the matter in suspense until some of the conflicting interests could be harmonized. Among other

parties who protested against that rate were Messrs. Coats [238] and Eden of the Washington cement plant at Concrete, Washington. They were the most vigorous objectors. There were a good many conferences, long distance phones and wires exchanged,—discussions one after another, and it appeared that if we published that rate it would disrupt relations between the cement companies and would be very objectionable to a good many of them, and I finally said that if the Irwin plant and Mr. Swigert, the two parties interested, could be satisfied and were satisfied to release me from my obligation to publish the rate, we would not publish it. I said this to Mr. Eden and to Mr. Coats. They asked me for about a week's time in which to bring about a settlement satisfactory to all concerned. It was a very exciting little period in the early part of March, 1915, so much so that I placed my resignation in the hands of our president in case that would relieve the situation. Some adjustment of the matter was made so that the parties to whom the promise had been made by me did not insist upon the promise being made good. We would have published the rate had they insisted upon it. Our lines do not run into Southwestern Washington or the Sound country. I am not familiar with the rates from Oswego to that territory. What Mr. Hollister testified regarding it seemed to me to be correct but I could not answer for the time which the rates became effective."

Upon cross-examination the witness testified: "One of the representatives of the Oregon Portand Cement Company, Mr. Aman Moore, came to me and discussed this rate question, said that they would soon be in the market and objected to the rate being made. The Oregon Portland Cement Company was not manufacturing cement at that time. It was organized and Mr. Moore at that time said [239] they would be shipping cement in about sixty days. When I spoke of the Oregon Portland Cement Company I had reference to the cement plant at Oswego. There was only one cement plant at Oswego and if its name was Oregon Portland Cement Company there can be no question about its identity. I had some communications with Mr. Aman Moore, none at the time to which I refer to his call. I was wrong when I said sixty days. Mr. Moore said that they would commence shipment in about six months. Mr. Aman Moore said he represented the Portland Cement Company, the Oswego plant. He was opposing this rate too. Whatever answer was made to this letter of March 6th was made by telephone. In the letter of March 9th the following day, from the Cement Company I took it for granted that I told him that we would immediately publish the rate to be effective April 14th. I think that was the tenor of the answer. I do not recall the telephone conversation. I see from the letter written the following day that they say that the writer understood from his verbal talk in Portland last

Saturday that all intermediate points would take the same rate. I know, however, that I did not intend to employ the same rates to intermediate points. I had a rate at that time on cement from Portland to Spokane; it was 25 cents, the same in both directions. This rate which I promised to put it was only from Spokane to Portland, not from Portland to Spokane. I had no request for a special rate from Portland to Spokane and I don't suppose we would have made the same rate in that direction. I have a record of what Mr. Aman Moore left with me. Following his call on me I sent a wire as follows: 'Had call this morning from Moore of Portland Cement Company who has wire from Coats who states they will be ready to commence shipment in about six months, [240] and when in operation expects Washington plants, both eastern and western, also California stay out Oregon territory.' This Moore was Aman Moore and the date of that is March 17, 1915."

Testimony of John F. Keenan, for the Government.

Thereupon JOHN F. KEENAN was called as a witness on behalf of the United States and testified as follows:

"I live in Seattle and have lived there for thirty-two years, am general manager of the Denny-Renton Clay & Coal Company. I identify this file of papers, marked Exhibit 103. They refer to the Company of which I am general manager. The capitalization of our Company is two million dol(Testimony of John F. Keenan.)

I don't think its financial condition has ever lars. been questioned. At the time of the correspondence in Exhibit 103 we made an effort to secure an agency or any other favorable consideration aside from the retailers' price for our Portland yard and our yards in Seattle and Tacoma for cement. We were not successful. I think Mr. Aman Moore called on me after the date of the papers in Exhibit I have but little recollection of this as we were not particularly interested at that time, having found it impossible to secure what we desired. was never suggested to me as a reason for refusing a quotation in Seattle that our account would not be attractive. We were not given any reason particularly; we were simply staved off from time to time. We paid no attention to the letters because we didn't regard it possible to secure what we desired in regard to the delivery of cement."

Upon cross-examination the witness testified:

"In the letter of March 6, 1916, we referred to Mr. Aman Moore; we didn't know any other Moore at that time. Our principal business is clay products including sewer pipe, paving, brick, fire bricks, electric terra cotta, terra cotta [241] products in general. What we sold of cement was sold with our products covering a considerable quantity of cement, and our patrons when they came to our yard would like to fill their order from one Company instead of going from our yard to some other part of the city to get cement. We never regarded the handling of brick as being in competition with cement

(Testimony of John F. Keenan.)

except on County roads; there was keen competition of course there. Paving brick didn't enter into the trade of which I was speaking, that was generally with the Counties. We sold structural tile also. That let us into competition with cement to a certain extent."

Testimony of George N. Short, for the Government.

Thereupon GEORGE N. SHORT was called as a witness on behalf of the United States and testified as follows:

"I am sales manager of the Three Forks Portland Cement Company. I have certain letters from the files of that Company which I was directed to bring in obeyance to subpoena. They were given to me by Mr. Block as Government inspector or investigator. I couldn't say whether they are part of the file of the Three Forks Portland Cement Company. I know the signature of Clark M. Moore. The signature on these letters looks like his signature."

The letters were thereupon marked for identification as Plaintiff's Identification 154.

Testimony of W. E. Burke, for the Government.

Thereupon W. E. BURKE was called as a witness on behalf of the United States and testified as follows:

"In 1915 up to June 1st I was in charge of the sales of the Three Forks Portland Cement Company. I have seen these letters (referring to the (Testimony of W. E. Burke.)

letters in Plaintiff's Identification 154). They were received in the mail by me at Three Forks Portland Cement plant from Mr. Clark M. Moore. At that time he was over the sales end of the Three Forks [242] Company and other cement companies. That is his signature upon those letters."

Thereupon the United States rested its case.

Thereupon the defendants offered in evidence the testimony of FRED R. MUHS, a witness called upon behalf of the United States upon the former trial of this case, and the testimony of whom was taken upon the former trial of this case, said testimony being introduced and read to the jury upon stipulation between attorneys for the United States and the attorneys for the defendants, and therein the said witness F. R. Muhs testified as follows:

Testimony of Fred R. Muhs, for the Defendants.

"I reside in Oakland, California; am not now in the cement business, but was prior to February, 1918. I am now secretary-treasurer of the San Francisco Bridge Company. I was manager of the Santa Cruz and Standard Portland Cement Companies during the years 1913, 1914, 1915 and 1916 up to October 27, 1916. The Santa Cruz and Standard Portland Cement Companies are separate and distinct corporations, each has its own plant. The plant of the Standard is at Napa Junction, California, about 50 miles north and east of San Francisco. It has a capacity of 2200 to 2500 barrels a day. Its capitalization as I recall it was four

million dollars. Its name was the Standard Portland Cement Corporation; it succeeded to the business of the Standard Portland Cement Company capitalized at two million dollars with a bond issue, but I do not recall the amount of the bond issue. I was manager of the Standard Portland Cement Corporation. The Santa Cruz Portland Cement Company has a plant located at Davenport, California, some 70 or 75 miles north of San Francisco on the Pacific Coast. The Santa Cruz has a capital of five million dollars and a bond issue of two million dollars; it [243] has a capacity of as high as 6500 barrels a day. I was manager also of that company. The officers of the two corporations were the same. The Standard Company had been shipping cement into the State of Washington before my connection with the company in 1907. To the best of my knowledge neither the Standard nor the Santa Cruz had been shipping cement into Washington from the latter part of 1914 on, though I think some small shipments went into Washington from Portland but not from California. Standard was shipping cement into Oregon when I first became connected with it in 1907. The Santa Cruz didn't begin shipments as I recall until about the end of May, 1907. I know nothing about the conditions since I left the Company, October 27, 1916, but they were both serving the State of Oregon at that time. Necessarily there must have been considerable similarity of prices as between California mills which I represented and the Washing-

ton mills prior to our withdrawal from the State of Washington. If there had not been there would not have been very much sale of the cement which was sold at a higher price. Our interest in the Washington market was dwindling so rapidly that we paid little attention to it so I cannot give a direct statement as to the prices in Washington prior to our withdrawal from that state. As the market went up in price we were very glad to follow any increase made by a competitor; we were very loath to follow the market down. These increases in price were not the result of any understanding between me and the Washington companies. I had some conferences with the Washington mills; I don't think there were any scheduled conferences. I spent considerable time in the Northwest, met Washington manufacturers here and have also met them in [244] San Francisco. I know Al Coats of the Washington, Jack Eden of the Superior and Mr. Cameron of the Olympic personally. I have met all three of these gentlemen together. I do not remember that I met them all together in Seattle. They have been in San Francisco at the same time but there were no scheduled meetings there. I do not recall there being any call meeting in 1914 for the three of them to come to San Francisco at the same time nor how it happened that they did go to San Francisco the latter part of 1914 at the same time. I do not recall definitely meeting them in San Francisco the latter part of 1914; if I was in San Francisco I probably

did meet them. With a few exceptions most of the cement manufacturers on the Pacific Coast have been to San Francisco at different times. Generally the representatives of the four central and northern California companies and the representatives of the three western Washington companies were there. Generally speaking there was no representative of the Riverside Company there. The Riverside Company competed with us more or less as far as freight rates would permit in central California. There was always considerable territory where our freight rates would approximately come together south of San Francisco in which the Riverside Company competed for business. There was always considerable uniformity of prices in California. I do not recall when we withdrew from the Washington territory or whether it was soon after this conference which is said to have taken place between the three Washington companies coming to San Francisco in the latter part of 1914. I don't recall any complaints made by the Washington manufacturers in regard to our participation in the Washington market; they necessarily would have been glad to see us out and let them have their own market. Undoubtedly [245] such a statement was made but I cannot say where. I should say such statements were not made in conference; such statements possibly might have been, the private expression as between myself and one of those manufacturers, possibly more than one of them were present. I do not recall such statements being

made when I and other California manufacturers were present. I think it probable such statements were made to me personally but I have no particular recollection of it. They were probably made at the time they began to serve the market. We were for many years the dominating factor in the Washington market and Galbraith-Bacon & Company who were our agents there were the strongest factor in that market and were handling our cement exclusively. The Washington and Superior mills were started as small mills and for a number of years were unable to supply the cement required in that state and for from three to five years after they started were currently reported to be floundering around financially. They had manufacturing trouble and we were able to stay in that market because they couldn't get down to legitimate and sane manufacturing business. When they did get on their feet and were making good cement and turning it our regularly our interest in that market rapidly declined until with the advent of the mill at Metaline Falls, shut us out of Eastern Washington largely, but not entirely because they were not able to take care of the entire territory. We had been shipping considerable quantities into eastern Washington. About 1913 the Olympic mill started operating and sold in western Washington and the International Company started in eastern Washington and then the scramble for business in Washington became so acute between the Washington companies as a whole that prices reached the point

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where we [246] were not interested in that market and would not protect Galbraith-Bacon & Company with prices which enabled them to hold the business which they had. They were loath to give up their prestige in the market and took on some Washington cements for sale. When the scramble for business got very hard the Washington companies gave Galbraith-Bacon & Company a larger commission than we were allowing them so that our business there was practically taken away from us and Galbraith-Bacon & Company dropped us and went to the Washington companies. We had no offices in the Northwest; we were handicapped in securing business. There were many losses by contractors in the cement trade, and believing that those persons who would turn to California to get their product a long way from home, were unable for financial reasons to purchase from the local market, we were not anxious to take their class of business and decided not to file our articles of incorporation in Washington and thereafter solicited no business in that state. I know Mr. Farrington. He was the manager of F. T. Crowe & Company in Portland, who were our agents there. I do not remember a meeting in San Francisco at the Palace Hotel nor do I remember that I told Mr. Farrington that everything had been arranged and that we intended to withdraw from Washington. I don't know whether immediately thereafter the Washington mills did not go farther south than Salem. If they did I was advised but I can't recall it at this

time. I have heard testimony to that effect while sitting here during the course of the trial. I cannot recall when the Washington mills adopted the policy of shipping cement no farther south than Salem. I believe that for a certain time they shipped considerably below Salem but afterwards they confined their sales pretty much to the Portland territory. [247] I don't know when this occurred or when I first heard of it. If this be a fact our office here probably informed me of it: I don't know whether I knew of it in 1916. I believe I was pretty well advised when I was manager, of the Washington market and of the Oregon market. I had nothing to do with advising the Washington manufacturers as to prices to be charged in Washington. At least I do not recall advising them in regard thereto. I think the individual manufacturers in Washington had discussed that question with me, either Eden, Coats or Cameron, possibly all three, but not at the same time. In March, 1914, F. T. Crowe & Company were our agents in Portland and Farrington was their manager. George T. Cameron was president of the Santa Cruz Portland Cement Company and of the Standard Portland Cement Corporation. I have often met cement manufacturers of Washington in Portland. I understand that the Washington mills did withdraw from the State of Oregon; I cannot recall at what time. I believe the Oregon mill started to ship cement sometime the middle of 1916. I know Mr. Butchart, have known him from eight to ten

years. I knew that he was president or in charge of the Canadian mill at Tod Inlet. I know Clark M. Moore. I probably met him about 1910 at what was known as a cement show which is an annual exposition of cement and cement products in Chicago but I am not sure that I met him there. I do not know in what capacity he was employed by cement companies at that time. Later he was the sales manager of the Colorado Portland Cement Company and was connected with what was known as the Boettcher interests but in what capacity I don't know. The Cement Securities Company, as I recall, is a holding corporation of various cement corporations in the Rocky Mountain district. I do not recall meeting Clark M. Moore or Mr. [248] Butchart in San Francisco a few months prior to the starting of the mill in Oregon. I do not remember meeting them in the early part of 1916; I did not meet them early in 1916. I have met them at different times in San Francisco. I have only met Mr. Butchart incidentally when he was passing through town. I never had any particular discussion with him and this would hold pretty much true as to Clark M. Moore. I left San Francisco in November, 1915, and was in New York until about the end of May, 1916. I did not come back by way of Portland. I do not know of any conferences had in San Francisco at which Clark Moore was designated to be sales manager of the Oregon Portland Cement Company. Mr. Sutherland is the sales manager of the Superior Portland Cement

Company, a Washington concern. I have always been on very friendly terms with the Washington manufacturers. I identify this as a telegram sent by me to Mr. Cameron, our president, in 1914. I remember sending this telegram which I identify as one sent by me in March, 1914. I also identify this as a telegram sent by me in 1914."

Thereupon the three papers identified by the witness were read to the jury, marked respectively Defendants' Exhibits 17, 18 and 19.

"We were always in a position to ship into southern California. I don't think we shipped into southern California subsequent to the date of these telegrams. I also identify this as a telegram sent by me to Mr. James, our agent in Portland for the Standard Portland Cement Company at that time. Early in 1914 F. T. Crowe & Company elected only to handle Santa Cruz cement and Mr. James was put in the office selling Standard Portland cement. I sent a correcting telegram July 31, 1914, to the effect that 'if the seventh [249] word is August change it to July' so that under my instructions the price was raised to take effect July 31st."

This telegram was read to the jury and marked Defendants' Exhibit 20.

"I don't know whether other corporations made a similar raise at the same time. I recall nothing as to when the Washington cement companies established Salem as their most southerly point in Oregon to which they would ship cement. I recognize this as a letter from our Standard Corporation."

Thereupon the same was offered in evidence, read to the jury and marked Defendants' Exhibit 21.

"I believe the letter says that the price fixed by our corporation was \$2.30 f. o. b. dock Portland but for Astoria it would be \$2.30 Portland plus freight rate to Astoria. At that time we were shipping to certain points in Oregon by rail and a large part of the cement came in by schooner, by water. I think, generally speaking, all cement shipped to Astoria was shipped by water. I think the Astoria market was supplied from the Portland stock by rail shipment. I don't recall that there was any particular understanding between California cement manufacturers as to the price of cement in Oregon in 1915. We were endeavoring to get our regular established market here. We had to take into consideration prices charged by other California companies as the market was competitive. Prices charged by California companies were known to all. I know of no conference between the California people fixing prices. Being in the same city we necessarily met many times. Undoubtedly there was more or less effort to get the same price, that being the maximum price obtainable in this market. I [250] recognize this correspondence shown to me."

The correspondence marked upon the former trial as Complainant's Exhibit 89 was thereupon read to the jury, the same being marked Defendants' Exhibit 22.

"The Golden Gate is a brand of the Pacific Portland Cement Company; Mt. Diablo cement is a brand of the Henry Cowell Company; both are California companies. I don't know when the Washington companies withdrew from Oregon; I understand they did withdraw. It was undoubtedly reported to me by our sales officers here at the time they did withdraw. I do not know whether the first intimation that I had that they had withdrawn was contained in the letter from Mr. Jack Eden to me under date July 29, 1916. I have heard that the Oregon cement plant started about the middle of 1916. I recall no correspondence having been had with the Oregon Portland Cement Company as to prices which we were charging for cement in Oregon. I undoubtedly sent them our price list; we sent these to all competitors. I think I sent to Mr. Clark M. Moore at one time a list of freight rates throughout the State of Oregon and I am unable to say whether I did so upon my own initiative or at his request. Any company would be interested in the freight rates of any other company which was selling in competitive territory. I did not know when Clark Moore was to become sales manager of the Oregon Portland Cement Company. I identify this letter as one dictated by me."

The same was a letter offered in evidence upon the former trial of this case as Complainant's Exhibit 90 and now marked Exhibit 23 and read to the jury.

"I don't think I saw Mr. Clark M. Moore in San Francisco about a month prior to the date of that letter; [251] I might have seen him a week prior but I have no recollection of seeing him at all. That is my letter and my signature. The enclosures referred to were freight lists, not the papers which are shown to me."

This letter was read in evidence to the jury, the same being introduced on behalf of the United States on the former trial of this case and marked Complainant's Exhibit 91 and now marked Defendants' Exhibit 23.

Upon cross-examination the witness testified:

"My companies were not shipping into Washington since about 1914. I do not recall whether I sent the price lists at or about the same time that I sent the freight lists. I would not call price lists freight schedules. When I left these companies they were still shipping into Oregon. The price of cement must be practically the same as cement is about one grade, all sold meeting one specification and most all sold at the same market. No company can get any bonus for its cement. There is only one specification for cement that is recognized in the United States. It was established by a technical body called the American Body for testing materials. When we first began marketing cement each manufacturer wrote his own specifications and he made the specifications fit the material which he was making. As time went on there was so much variation in the specifications that there

grew a desire for a uniform standard. At one time the Government had specifications, every department of the Government having different specifications. That has all been harmonized now. There is practically one specification for the Government which is practically the same as the specification of the American Society for Testing Materials. This has been the condition [252] practically as long as I have known anything about cement. The specifications are revised from time to time. Freight rates practically limit the distribution of cement as the price of cement like the price of any other commodity is practically fixed by the competition in the market in which you are selling and what primarily is dependent upon freight rates to cement mills stated at different points manufacturing equally good cement and at practically the same cost of production would be limited in their ability to ship without loss by the freight rates. In the California field the cost of manufacturing is very close with all mills. I first began to deal in cement in 1907 with the Standard and Santa Cruz Companies. At that time the mills were as follows: the California Cement Company with a plant at Colton 50 or 60 miles easterly from Los Angeles; the Pacific Portland Cement Company at Martinez, 60 or 70 miles from San Francisco; the Standard Portland Cement Company at Napa Junction. I do not remember whether Washington mills were then operating or not. About a month after I went with the company the Santa Cruz

Portland Cement Company started its mill. We distributed in Western Montana, Idaho, Washington, Oregon, California, Arizona, Nevada and Utah. These were the only mills in operation in California at that time and possibly one of the Washington mills and there was a small mill in Utah, the product of which was all used for local consumption. The mill at Colton didn't ship into the territory I defined as it was a small mill and unable to supply the territory contiguous to the mill. I do not know the distributing zone of the Pacific Portland Cement Company but probably that Company covered practically the same territory. Afterward the Cowell [253] Cement Company began operations in about 1908 or 1909, the Riverside I believe in 1910, the Superior Portland in about 1908; there were a number of plants added later, two in the Spokane district, I cannot give the date upon which they began operations; there was also a plant added afterward at Three Forks, Montana about 1912 or 1913; the Olympic came into the market in about 1912 or 1913. I once investigated this matter, ascertained the facts and made a minute of it. This was the fall of 1916. I think after the indictment of this case was found this information which I made was in the nature of a map showing the territory once served by our mills. I have a list of cement mills in operation in 1917; California Portland Cement Company, Logan, California, completed prior to 1902. Pacific Portland Cement Company, Cement, California, completed 1902; Standard Port-

land Cement Company, Napa Junction, California completed 1903; Santa Cruz Portland Cement Company, Davenport, California, completed 1907; Superior Portland Cement Company, Concrete, Washington, completed 1907; Washington Portland Cement Company, Concrete, Washington, completed 1907; Cowell Portland Cement Company, Cowell, California, 1909; Los Angeles Aqueduct completed 1909; Riverside Portland Cement Company, Riverside California, completed 1910; Golden State Portland Cement Company, Oro Grande, California; Lehigh Portland Cement Company, Metaline Falls, Washington, completed 1911—I think that had a different name when started, I do not recall the name; it is now operated by the Lehigh Portland Cement Company: International Portland Cement Company, Irwin, Washington, completed 1913; Olympic Portland Cement Company, completed 1913; Oregon Portland Cement Company, Oswego, completed 1916; Mission [254] Portland Cement Company, Victorville, California, completed 1916; Gold Hill Portland Cement Company, Medford, Oregon, established 1917; Old Mission Portland Cement Company, San Juan, California; estimated completion 1917, didn't start operating in 1917: Three Forks Portland Cement Company, Trident, Montana, completed 1909; Union Portland Cement Company, 1907; Ogden Portland Cement Company, Brigham City, Utah, 1911; Utah Portland Cement Company, Salt Lake City, Utah, completed 1902. All of these companies are now operating in the

territory which we served when I first became connected with our company. The plant at Trident I think is a little farther east than we ever served. These several cement companies started business in different parts of the country have absolutely restricted the territory in which we could distribute cement. Utah, a portion of Nevada, all of Arizona, all of southern California, all of Montana which we served, all of Idaho, all of Washington and portions of Oregon has been cut off from us. Cement, being a heavy commodity, its zone distribution is practically limited by freight rates and as these mills came into operation into a territory far away from us they naturally took the market which was their home market. Freight rates for us would be so high as to absolutely prohibit us from competing with these mills in these markets. Mills situated close to the territory consuming cement would have a lower freight rate and would also serve more readily from a standpoint of time than mills farther distant. Our mill at Napa Junction I should judge is 500 miles from Los Angeles so the southern California mills could serve southern California territory better than our mill. Having also a freight rate the mill located in southern California less than the Standard and the Pacific would have, [255] the Standard and Pacific could ship into that territory only at a loss. The building of the Washington mills had the same effect upon our business in Washington. I cannot state how their freight rate compared with ours. The principal

cement markets of western Washington which we reach are Seattle and Tacoma. I think the Washington mills have a rate of about \$1.00 a ton to these points and I should say the central California mills have an average of more than \$2.25 a ton. don't know what the freight rate was from southern California mills to Washington. I presume it was probably the same as our freight rate. Our ability to ship into that market was only due to the lumber schooners going back without cargo needing some heavy freight to hold the bow down, to buck the northwest gales they were going against. They didn't as a rule carry freight except heavy commodities such as cement. This cement for Astoria would be shipped in the same way, but as that community used a very small amount of cement we were unable to carry a stock of cement at Astoria such as we would carry at Seattle or Portland or some larger community. It frequently happened in the fall especially, that we were short of cars and we would try to stock up during the summer months when there were plenty of cars available; we would try to put a considerable quantity of cement on the docks in Portland and it frequently happened that we would have to supply our Astoria customers from Portland. I am unable to say whether the schooners carrying cement to Portland would stop at Astoria or not. I have some notations in regard to the capacity of these several mills: California Portland Cement Company, 4000 barrels; Pacific Portland Cement Company, 5500 barrels; Standard Portland

Cement Company, 3,000 barrels; Santa Cruz Portland Cement Company, 6,000 barrels; Cowell Portland Cement [256] Company, 3,000 barrels: Riverside Portland Cement Company, 5,000 barrels; Los Angeles Aqueduct Plant, 1200; Southwestern Portland Cement Company, 2,000; Superior Portland Cement Company, 2,000; Washington Portland Cement Company, 2,000; Olympic Portland Cement Company, 1,800; Inland Portland Cement Company, 1,800; International Portland Cement Company, 1,800; Oregon, 1,000; Beaver, 1,000; Union, 2,000; Ogden, 600; Utah, 600; Old Mission, 2,000; Three Forks, 2,000. When I sent out our price list I think other companies also sent out price lists. We used to get some from time to time. I don't think all the companies sent out price lists. Cement was not always sold according to the price list. If a mill was badly in need of tonnage it did not hold to the price list, and at the time I was connected with the industry there were violent fluctuations in all markets. If we had a little cement that we wanted to get rid of we were apt to make a price for it in order to get rid of it. I think frequently we have sold cement at a loss. The first two years we operated the Santa Cruz and Standard plants were not profitable years. At the end of 1908 the management of the company was changed, the old management retired and since that time I think the companies have made money."

Thereupon the attorneys for the defendants asked the witness the following questions: "Now, give the

jury some idea of how profitable it has been, say how much money in proportion to the capital your mills have made." To this question the United States objected on the ground that the same was immaterial and this objection was sustained by the Court and the defendants excepted to the ruling of the Court and the exception was allowed.

The witness further testified: [257]

"Since 1914 when we withdrew from Washington we have made some sales there but didn't solicit any business in Washington as we were hopelessly out of the market established by the Washington mills. They were so anxious to secure business that they made prices at which we didn't care to take the business. While we were operating in Washington our business was conducted through Galbraith-Bacon & Company. In 1913 we did sell a little cement direct to Tacoma Trading Company, but that agency was gathered in by the Olympic Portland Cement Company and we were left out. I do not know when I first met Mr. Clark M. Moore or with what concern he was connected at that time. I did not meet him two months prior to the letter of May 27, 1916, as I left San Francisco the latter part of November, 1915, and did not return to the office until some time in May, 1916. I think there was some meeting of the Portland Cement Association in San Francisco in 1916. This is an association taking in practically all the manufacturers of cement of the United States and Canada, organized for the promotion of the uses of cement to see that

it is properly used so it will do good work, and instructing the people how to use it. This Association issued pamphlets or periodicals for that purpose; it had absolutely nothing to do with fixing prices and the price of cement was never discussed at those meetings. I recognize most of these pamphlets as publications of this Association."

The witness refers to the pamphlets heretofore offered in evidence but excluded by the Court.

"These periodicals were distributed among our trade, sometimes directly from our office and sometimes through the Association. I think we distributed both to dealers and consumers. I have no recollection of meeting Mr. Clark M. [258] Moore in San Francisco in 1916. If I met him I had a talk with him; I do not recall having any talk with him about prices. I did not have any talk with him about dividing territory or anything of that kind or where he should sell cement or what price he should ask for cement. Mr. Clark M. Moore was in San Francisco once to my recollection, at which time I think some two or three of us were together. I think this was after 1916 although I am not able to say. At this time there was no talk between Mr. Clark M. Moore and myself or those who were with me regarding any division of territory or in what territory we would respectively sell our product and no talk in regard to prices. I know Mr. Butchart. I never attended any meeting of the cement Association at which Mr. Butchart was present; I believe I never attended any meeting of cement manu-

facturers at which Mr. Butchart was present. I think I met Mr. Butchart once at the office of his company in Portland. I cannot tell at what time. I had called to verify a rumor which I had heard that the Oregon Portland Cement Company were going to pay a considerably larger commission to dealers than our companies were paving, and I think Mr. Butchart was in the office at the time I called. I had no talk with Mr. Butchart regarding that feature nor upon the subject. I believe Mr. Clark M. Moore was there at that time, but I had no talk with him in regard to the territory in which he or we or anyone else should sell cement or in regard to the prices at which we or he or anyone else should sell cement. I went there to get information regarding a dealer's commission. The Oregon Portland Cement Company was but a small feature in the cement business on this Coast. I cannot give you the average cement market in the state of Oregon for the last five or six years. I think the last year or two that we operated here we put in [259] something like one hundred thousand to one hundred and ten thousand barrels,—I mean, in 1916 and 1917. We have put in as much as 550,000 barrels in this market in one year. Cali-'fornia competitors were also shipping cement into this market at that time. I have no way of approximating how much they were shipping to this market. They were doing an active business here during all that time. I do not remember meeting Mr. Clark M. Moore in San Francisco at the time the

Government had its representative in San Francisco investigating the cement business, establishing prices, etc. The meeting with the War Industry Board was after I had severed my relations with the cement company. I don't remember anything in particular in regard to the Washington mills limiting their trade to Salem on the south in Oregon. The bulk of our cement in Portland came by schooners; south of Salem we endeavored to ship by rail as it was cheaper for us to ship by rail. I cannot tell where our freight rates broke, but shipping to Portland by water was cheaper than by rail and shipping to some point down the valley it was cheaper to ship by rail than by water. I cannot give you the point where it was cheaper to ship by rail than by water. It was some place below Salem, but whether as far south as Albany I cannot say. In connection with the letter offered in evidence about Mr. Crouch: Crouch apparently complains that the price we were asking him for cement would not permit him to sell in competition with his competitors. That was in 1915; I presume it was some case where the county advertised for its requirements for cement for the fiscal year and he was afraid he wasn't in a position to get the business because he claimed competitors were quoting lower prices. The prices in Oregon were based as a rule upon the Portland market, Portland as a [260] base and the Portland base was \$1.90 per barrel net at the docks. The price in San Francisco was \$1.90 net. Generally speaking, the price

of cement at points known as Pacific Coast terminal points, such as Seattle, Portland, San Francisco, Los Angeles, and San Diego, were about on the same level. This condition was brought about by what they used to call a postage stamp rate, all these points having the same freight rate from eastern mills and the same rates from European mills shipping cement at the time that the bulk of the cement coming in was European cement. The big years for European cement were 1907, 1908, 1909, and 1910 or along that time. Since 1910 practically no European cement has come in as the local mills were getting pretty well established and supplying the trade themselves. Furthermore, the vessels that used to come to get grain from our western coast points were mostly withdrawn, the grain moving another way. When the grain ships were coming in, cement was shipped from Europe by these ships at a very low freight rate, rather than carry ballast. When our mills got to about their capacity in California our prices were considerably lower than the prices at which foreign cement has been sold theretofore. Immediately after the San Francisco catastrophe cement sold as high as \$6.00 a barrel. I tried at all times to keep posted as to the market of cement and as to the prices at which our competitors were selling. This was necessary if we wanted to sell our products. We always felt that we were entitled to get as much as they were getting and did not expect to be able to sell if we were trying to get more. When the price of cement was

fixed at \$1.90 in San Francisco and Portland I was not connected with the sales department. At that time the Kansas mills were the big distributors of They [261] had gotten into a chaotic cement. position upon prices and about terms of sale and terms of payment and were selling cement at about 60 cents a barrel net at the mill. The freight rate at that time from their mills to the Pacific coast terminals was about \$7.00 a ton or \$1.33 a barrel, making cement cost here about \$1.93. The coast mills made a price of \$1.90 and this price was better than 3 cents that appears on the surface because of the uncertainty of getting cement in carload lots from Kansas, the difficulty of getting cars when wanted, the time required for transporting and the freight on return bags which was higher where the bags were returned to Kansas than where returned to the local mills. I am unable to recall the raise in the price of cement from about \$1.70 to \$1.90; it is probable that we figured that our competition would permit us to get that \$1.70. All prices below that had been very unsatisfactory to the cement manufacturers. We took into consideration the cost of manufacture and freight and the competitive conditions at the destination of the cement would be the governing factor."

Thereupon the attorneys for the defendants asked the witness to tell the jury whether in his judgment, taking into consideration the cost of manufacture and the freight which would be paid upon cement, the price fixed was or was not a reasonable price. (Testimony of Fred R. Muhs.)

The United States objected to this evidence and the objection was sustained and the evidence was not admitted, and to this ruling of the court the defendants excepted and the exception was allowed.

Thereupon the witness further testified:

"I cannot tell you how we happened to fix that price for our cement; I presume in our judgment that was all the competition at the destination would stand; there was competition [262] at all times. I do not remember when this raise was made and have no recollection whether there was any conference with other mills or with any competitors at the time this price was changed and raised."

Upon redirect examination the witness testified: "The price of cement was \$1.90 f. o. b. San Francisco. The Standard mill is approximately 40 miles and the Santa Cruz mill approximately 70 miles from San Francisco. At some times the price in San Francisco has been lower than \$1.90. When it was \$1.90 in San Francisco it was sometimes \$1.90 in Portland; my recollection is that this was true in 1915 and 1916. I am unable to say whether the price f. o. b. Seattle in 1914 was \$1.90. When you are selling your product you must meet competition. The price of \$1.90 f. o. b. in Oregon was for our own product, our company established the price on our own product here. I would say that the price established by other California mills in Oregon at that time was approximately the same. I don't know which was the first of the companies to establish (Testimony of Fred R. Muhs.)

that price; it was prior to my connection with the sales department. I don't know whether the price was fixed simultaneously by all companies or not. If a raise was made in the f. o. b. mill price in Portland I would say that this raise was made approximately at the same time by all the California companies."

Testimony of W. J. Kerr, for Defendants.

Thereupon W. J. KERR was called as a witness by the defendants and testified as follows:

"I am and for some time have been president of the Oregon Agricultural College. I was not interested when the company was first organized to build a plant at Oswego but became interested soon after, having purchased some stock and I have been interested in that plant as a stockholder [263] all times since. I was not a director upon the original Board, but was upon the second Board. I presume I remained a director until the last company which finished the plant was organized. My relations with Aman Moore were always friendly. I had quite a substantial interest in the company. I helped to finance the last organization. When I came to Portland I frequently visited the offices and several times visited the plant, was interested in it as an Oregon industry and of course in my investment in it. I nearly always met Aman Moore when I visited the plant, either went with him or found him at the plant. These letters offered in evidence passing between Aman Moore and R. P. Butchart,

(Testimony of W. J. Kerr.)

relating as it is claimed to arrangements which Mr. Butchart was going to make so that his company would have the right to fix prices in Oregon and relating to the territory in which his company's product should be sold, never came to my attention. They were never discussed during this period. I never saw any letters relating to that matter at all. I do not recall that Mr. Aman Moore ever made any statement to me about them. The first time that this question was agitated was when I received a circular letter from Mr. Aman Moore in which he called attention to something of this kind and asked me to give him my proxy to be used at a meeting to be held subsequent to that time. I cannot tell the exact time at which this occurred. I never knew of any claim of that kind before: I never heard of any claim of that kind before. My relations with Mr. Aman Moore were friendly; I never had any difficulty with him at all. I did not see Mr. Aman Moore every time I came to Portland on my official business, but occasionally I did see him and visited the plant."

Upon cross-examination the witness testified: [264]

"My duties as president of the Agricultural College occupy my time quite fully."

Testimony of Paul C. Bates, for the Government.

Thereupon the testimony of PAUL C. BATES, a witness called upon behalf of the United States upon the former trial of this cause was read to the jury, pursuant to a stipulation between the United States and the defendants wherein the said witness testified as follows:

"I live in Portland, have lived there nearly 26 years; am and during that time have been in the insurance business. At one time I was director and stockholder of the Oregon Portland Cement Company; was a director from the time it was organized and at the time it put its cement upon the market. Because of conflicting statements that I had had made to me as to the prices and policy of the corporation, without saying anything to Aman Moore or any official I decided to make an investigation and had letters written to various representatives of the cement corporations then offering their product in Portland. These were made on the letter-heads of and signed by Inman-Paulson Lumber Company. I also had letters written by other corporations. Before writing these letters I asked Mr. Minor, while he was chairman presiding in the office at regular meetings of the directors, whether any arrangements or agreements had been made, and he denied it. I also asked Mr. Aman Moore; I don't recall whether I asked others or not or whom I asked. Mr. Minor was director and chairman of the meetings when Mr. Moore didn't preside."

Thereupon, upon the request of the United States, the witness produced and identified certain letters which were introduced upon the former trial of this cause and marked Complainant's Exhibit 78 and which were read upon [265] the trial of this cause to the jury and marked Defendants' Exhibits 24 and 25.

The witness upon his further examination testified:

"These are the original letters. My investigation was also made through the Tacoma Dredging Company and got replies from the Tacoma Dredging Company."

These letters were read to the jury and offered in evidence upon the former trial of this case and were read to the jury upon this trial.

"I made further investigation, but returned the letters to the Hawley Pulp & Paper Company at Oregon City, through whom investigation was made. After making the investigation I discussed the matter with Mr. Aman Moore, asked him to account for it; he said it was so and that he hoped to have the situation changed. I did not discuss the matter with Mr. Clark M. Moore; I might have met him just once. I was introduced to him at the meeting at which he was made sales manager. I did not discuss the matter with or talk to Mr. Butchart about it. I don't think I ever met him but once or twice. No conversations or discussions were ever had by me or with me in the presence of Mr. Clark M. Moore or Mr. Butchart. I have made no effort

to get the letters from the Hawley Pulp & Paper Company. After this investigation I wanted to resign, but Mr. Aman Moore asked me to hold on for a few weeks and I did so in the hope that an investigation would be made to determine whether there was any agreement about maintaining prices or dividing territory. Subsequently there was an investigation held to hear these charges and they didn't consider the charges sustained, so my resignation was sent in and was accepted. I think it must have been sometime [266] in August or the early part of September, 1916; it was prior to the time the indictment was returned."

Upon cross-examination the witness testified:

"These letters were sent entirely upon my own instance without talking the matter over with Mr. Aman Moore. I sent them out because of the claims made by Mr. Aman Moore and the denials made in the meetings. I think Mr. Aman Moore first made this claim the latter part of May, 1916. It was made at a meeting of the directors and also outside of the meeting. I did not disclose to any of the other directors that I was sending these letters or getting these replies because the subject had been discussed and there were about as many denials of it as there were those that were questioning as to whether there was any foundation for the charges. I didn't bring the matter before the other directors because I didn't think the majority of the directors were in sympathy with the charges.

Before the directors called for an investigation and a committee was appointed I did not think it to be my duty to tell my co-directors what information I had received. The investigating committee I refer to was Mr. Griffith, Mr. Cookingham, and Mr. Ainsworth. I submitted these letters at that time at a meeting of the Oregon Portland Cement Company's directors early in September at which Mr. Minor was present. There was a full Board meeting and no agreement reached. The letters were not produced at the meeting, but I referred to them. Mr. Andrew C. Smith, Mr. Aman Moore, Mr. Ballard, Mr. Minor, and I think Mr. Newlands was present; I think Mr. Johnson was present, but I would not say positively that he was. Mr. Butchart was not present. I never made the contents of these letters known to Mr. Butchart because he didn't attend the directors' [267] meetings. He attended very few meetings; I only remember his being present at two or three meetings. I knew Mr. Butchart was president, I knew what his duties were as president, I knew how I could reach him, I made no attempt to give him any notice of these letters. I had reasonable ground to assume that Mr. McDonald, the secretary of the corporation, as his representative and he was present at the meeting. I never brought these letters before Mr. Clark M. Moore. I brought them before the directors' meetings, the only body that had any official connection. This was done at the meeting of August, 1916, in the Wilcox Building. I did not

produce any letters: I referred to them and to my investigation. I remember that that meeting had been called by Aman Moore as vice-president and also by Mr. Ballard as vice-president. I remember that Mr. Ballard read his own call first and then read the call of Mr. Aman Moore. Mr. Ballard's call was first, I believe, but Mr. Aman Moore claimed that he had made the first call. I think both calls were prepared by Mr. Minor and that he said he would send out a call for meeting for either party. The directors deadlocked as to which call should be taken up first. Nothing was done at that particular meeting; there may have been more than one meeting in August. The meeting to which I refer was one that Mr Griffith attended. It was a directors' meeting; my recollection was that it was in August, but it may have been early in September. The directors sat in one room and the committee in another. I remember now that when the directors couldn't get together a call was made for a meeting of the stockholders and Mr. Griffith was not a director; he attended as proxy for a lot of stockholders; he and Mr. Ainsworth and Mr. Cookingham [268] held proxies from a majority of the stockholders. That is the meeting to which I refer and at that meeting the directors met in one room and the stockholders in another. I remember that at that time all parties had agreed that a meeting of the stockholders should be held and that the stock was practically all represented and that these matters should be threshed out before the stock-

holders. Yes, I now remember that when the matter came up before the directors it was referred by the directors to the stockholders. I think at that time Mr. Aman Moore had brought some action or suit; I do not remember the charges which he made in this. I remember that he had actually gotten a preliminary injunction preventing certain parties acting as directors until the further order of the court. I suppose under the order of the court neither Mr. Butchart nor Mr. Newlands nor Mr. McDonald could act as directors. I do not remember the exact tenor of all these matters, but I remember that another injunction was obtained which prevented the stockholders from acting. They met from day to day for several weeks; I didn't attend all the meetings. I believe it is true that the stockholders adjourned from day to day because Judge Wolverton had made an order and they didn't feel that they could act as long as that order was in force. I don't remember all the details. I don't recall that at the meeting at which I tendered my resignation I was not the only director who resigned. There were several plans about resigning; I remember some directors volunteered to resign. I remember that one plan was that two directors from either faction should resign and other directors take their place. I don't know whether the stockholders suggested who should resign or who should take their places. [269] I remember that one director on either side should resign and two new directors should be put in, but I don't remember

who the two were. I remember there was a faction in the Board at that time and that I and someone, either Mr. Johnson or Mr. Minor or Mr. Newlands, resigned together and two men were elected and took our places. Then someone else resigned from the Moore faction and someone else from what was called the Boettcher faction and somebody else took their places. I don't recall when I produced these letters. I felt I had an obligation as a director and was not able to find out anything in view of the conflicting opinions. That was my motive in making the investigation. I don't recall that long before that Mr. Aman Moore had brought two suits, one in the name of the corporation and one in his own name; there was so much of it I don't recall. I remember the question was raised whether Mr. Aman Moore had a right to bring suit in the name of the corporation; the matter was brought before the Board of Directors and Mr. Minor's opinion was asked about it and I remember that at that time Mr. Minor demanded an open meeting, that Mr. Aman Moore give him evidence and lay before him evidence of any improper or corrupt action on the part of the corporation. I do not recall what answer Mr. Moore made to this demand; I remember that Mr. Minor stated that he was entitled to the information not only as attorney for the company but also as a director. Apparently these letters and what I had done were never investigated or brought before the Board at all until the hands of the Board were tied. I don't recall when Mr.

Clark M. Moore was made a director. Butchart was not present at any of the meetings to which I have referred. He sent his own proxy and [270] got proxies from his friends and sent them to Ainsworth, Griffith, and Cookingham. I was simply a director and not an officer. I had no agreement with Mr. Aman Moore in regard to my being employed by the company, never contemplated being sales manager. If any inducement of that kind had been offered it would not have been considered. I believe Aman Moore did say something about making me sales manager with a salary of \$5000.00 a year; it was never seriously treated by me. No salary paid by the Oregon Portland Cement Company would have attracted me. I didn't know anything about the bringing of the first suit or the threat to bring the first suit until the suit was brought. I remember that at some meeting of the Board Mr. Minor complained of a suit having been brought against him and others; I remember that Mr. Minor was a party to this suit, a party defendant. I never went to Mr. Minor or to any other director to tell him or them what I was going to do. I was vice-president I remember for a short time, but I don't recall whether it was of the Oregon Portland Cement Company or of the Portland Cement Company. I resigned as director and vice-president at the same time. My resignation was first tendered on June 25th. I don't remember the reason I gave for resigning; I didn't give as a reason that I found that the corporation was do-

ing something that I thought was not legal; this matter had already come before the members of the Board. I do not recall that I as vice-president issued the call for a stockholders' meeting; I may have. I remember after tendering my resignation I withdrew it. I did this because Mr. Aman Moore told me that the condition which I was criticizing would not be continued. I do not recall that the suit brought by [271] Aman Moore against the directors had anything to do with my resignation. I remember that before I wrote those letters in 1916 there had been much friction between Mr. Butchart and Mr. Aman Moore and the Board had been much divided between them. I remember that Mr. Butchart issued a call for meeting of the directors to change the by-laws, change the by-laws regarding three vice-presidents and elect one vicepresident. We held a meeting, if I remember correctly, and abolished the vice-presidents. This call for the change in the by-laws was made prior to the date of these letters which I have offered in evidence. There were three vice-presidents, Mr. Moore, Mr. Ballard, and myself. I wouldn't say positively that Mr. Minor presided as chairman of any meeting. The meetings were in his office and up to the time that Mr. Moore was removed as manager he presided as a rule. I think he still presided as vice-president at meetings with the exception of possibly one or two meetings. My impression is that Mr. Minor proposed things at the meetings as to the program to be adopted prior to the

time the row broke out in May or June, 1916 Everything at the meetings was pretty well ironed out before the meeting was called and was done at the meeting with unanimity."

Upon redirect examination the witness testified: "The only time I offered to present the letters from the various cement companies to Mr. Minor was at the stockholders' meeting where there was this committee holding proxies. I stated at that meeting that I had these letters and that they were welcome to them. I gave these letters as my reason for being inclined to think there was considerable foundation for Mr. Aman Moore's charges; that I felt I was not in harmony with the Board as a whole or in [272] any position to keep in touch with the cement business; that there was too much conflict and having made this investigation for my own private purposes I thought it was better for me to resign than to participate with a board where I was unable to keep in touch with those who were interested financially so much more than I. They did not ask to see the letters. The letters were never called for. The investigating committee about which I have testified was one nominated or appointed by the stockholders. I presented my facts to that committee and also to the further committee appointed by them to reinvestigate the entire subject. Of this second committee Mr. A. King Wilson was chairman. I had an impression that it was fairly well

understood what my point of view was and what my investigation had led to."

Thereupon the resignation dated June 24, 1916, was presented and identified by the witness.

The witness testified:

"June 24th was very shortly after the receipt of the letters I got; subsequently I had other letters, some of them dated in July. My resignation was not accepted, it was recalled by me. I put in my resignation as vice-president because of the record which had been brought to my attention about the attempt to remove the vice-presidents and a call for that purpose."

Upon recross-examination the witness testified: "I recognize this book as a minute-book of the corporation during the time when I was director and vice-president. Yes, this is my resignation: June 24th, 'Mr. George McDonald, secretary Oregon Portland Cement Company, 704 Wilcox Building, Portland, Oregon. Dear Sir: Kindly accept this as resignation from the Board of Directors [273] of the Oregon Portland Cement Company, effective at once. This action is taken because of my inability to give proper attention to the responsibilities of the directorship. As a stockholder I wish the company every success. I remain,

Very truly yours,

PAUL C. BATES.'

Adjoining this resignation I find the following: 'In filing my resignation as a member of the Board of Directors of the Oregon Portland Cement Com-

pany, I failed to include also the office of vice-president. Kindly accept this as a notice of resignation from both offices.' July 29th I notified Mr. Aman Moore, vice-president of the Oregon Portland Cement Company, 'Referring to my letter of June 24 addressed to the secretary of your company, resigning as director, I beg to state in view of same not having been accepted at this time, upon reconsideration, I beg to announce my recall of said resignation.' In my testimony I have referred to this I believe, and have explained that I had been assured that the condition I was complaining of would be removed. It was not removed to my satisfaction."

Testimony of C. Howard Crawford, for Defendants.

Thereupon C. HOWARD CRAWFORD was called as a witness on behalf of the defendants and testified as follows:

"I reside at Walla Walla, am in the retail lumber and fuel and building material business, connected with the Tum-A-Lum Lumber Company. We handle cement and operate 55 yards handling cement in all of them. The yards are situated in eastern Washington from Walla Walla to Yakima north as far as Pomeroy and from Walla Walla south into Oregon to Pendleton on the main line of the Oregon-Washington Railroad & Navigation Company as far west as Hood River and on branch lines in Oregon, the Deschutes branch, Shaniko [274] branch and the Heppner branch. Over half of these lumber yards are situated outside of a territory

(Testimony of C. Howard Crawford.)

defined as drawing a line from Portland east to the Deschutes river or Umatilla, then south and bounded on the south by a line about Drain or Roseburg. I have been engaged in this business for about 14 years. I don't remember the exact date when the Oregon Portland Cement Company entered the cement market. Prior to June, 1916 we bought cement mostly from the international Portland Cement Company and the Lehigh Portland Cement Company, Spokane Companies. I have a memorandum made by me in my handwriting which gives the price of the Oregon Portland Cement Company and the price of the Lehigh Portland Cement Company, the price of the Oregon Portland Cement Company is as of June 9, 1916 and the Lehigh as of April 8, 1916. This memorandum was made from quotations made me and I made purchases under these quotations. In almost every instance the prices of the Oregon Portland Cement Company to us were 10 cents a barrel less than the quotation we received from the Lehigh Portland Cement Company. The places are Culver, Gateway, Grass Valley, Ione, Irrigon, Lexington, Madras, Maupin, Metolious, Morrow, Redmond, Umatilla, all in Oregon. I recognize this as a copy of a letter received by me."

The same was introduced in evidence marked Defendants' Exhibit 26 and read to the jury.

"In connection with Defendants' Exhibit 26 beside the 10 cent sack allowance and the 5 cent allowance for cash there was a verbal understanding (Testimony of C. Howard Crawford.)

that we were to receive 10 cents a barrel, dealer's commission. I purchased under these quotations and got the allowance of 10 cents per barrel in reduction of the prices shown by the quotations. I know Mr. Hollister, salesman connected with the Oregon [275] Portland Cement Company; he called upon me and tried to secure orders from me. I don't remember whether he quoted for all of our yards. The memorandum which I have is the only record which I have. I don't remember when I made the first purchase from him, but I think the first time that I met him."

Upon cross-examination the witness testified:

"Culver is on the Oregon trunk of the O.-W. Railroad lines leaving the main line on the Columbia river at Sherman, extending along the Deschutes river. Gateway is on the same line; Grass Valley is on the Shaniko branch, not far from the Deschutes river running out from Biggs between the Deschutes river and Umatilla. Ione is on the Heppner branch running south between Deschutes and Umatilla. Irrigon is between Deschutes and Umatilla, the first town I think west of Umatilla Lexington is on the Heppner branch, next to Ione. Madras is on the Deschutes branch, Maupin is on the Deschutes branch, Metolius is on the Deschutes branch; Morrow is on the Shaniko branch, Redmond is on the Deschutes branch. I was a dealer in building material in 55 yards. I do not remember getting any quotations from the Oregon Portland Cement Company other than those I have (Testimony of C. Howard Crawford.)

testified to. In our yards we sold lumber, lime, cement, coal, brick, etc. The Oregon Portland Cement Company never objected to selling cement to us on the ground that we were carrying brick or lumber or competing building material. I think the first time I saw Mr. Hollister he came to Walla Walla. I cannot fix the date.

Testimony of C. T. W. Hollister, for Defendants.

Thereupon C. T. W. HOLLISTER, called as a witness on behalf of the defendants, testified as follows.

"I was in the sales department of the Oregon [276] Portland Cement Company in 1916. I have been in the employ of that company continuously since September, 1915. I made my first trip into eastern Oregon March 1, 1916. I went to Pendleton, La Grande, Baker, Pilot Rock and on my return stopped at the Dalles and Hood River. I was sent out to look up the County bond issue in Umatilla County and in Union County and to use my influence to defeat the bond issue and also to visit dealers in the towns and select or recommend the best dealer in each town that I visited. When I returned to Portland the latter part of March I worked in the city under the instructions of Mr. Aman Moore, looking up paving work. At the time of this trip in March, the Oregon Portland Cement Company had not manufactured any cement and had none for sale. I first became acquainted with Mr. Clark M. Moore the latter part

of April, 1916, met him at the Portland hotel a little after the middle of the month. When I met him he reinstated me in the sales department and I took control of that department during his absence, began by getting up letter-heads, stationery for the company, arranged for telephones and looked after detail matters connected with the establishment of the sales department. I think Mr. Clark M. Moore was in Portland only a few days and I think he returned to Denver, leaving me in charge of the sales office. He directed me beside getting up the stationery and getting the office started, to pick up the tariffs, not only from Portland and the tariff to be used from our mill, but also the tariffs from all competing plants that I could get hold of and prepare a map for him. I prepared such map, giving the lines of all railroads and sent it to Denver so he could have a picture of the Northwest in his Denver office. I don't remember that any instructions [277] were given me by Mr. Clark Moore at that time in reference to making quotations or soliciting business. Clark Moore returned to Portland the latter part of May or the first of June. When he got back we were getting ready for the sales and soon after his return, in June, we started our salesmen on the road and began to canvass. I did not go on the road at that time; I remained in charge of the office practically as assistant sales manager. I had general supervision of the office and the direction of the salesmen on the road. I called on

three dealers in Portland. We had two salesmen on the road, Mr. Wellman and Mr. J. E. Moore. I think Mr. Clark Moore remained in Portland at that time until the latter part of June. He gave me during that time no instructions as to the territory in which business should be solicited or prices quoted. He returned then to Denver, leaving me in charge. While here, and when he left he gave me no instructions in reference to the territory where I should ship. He told me to get as near as possible what we might term the maximum price, what our competitors were selling for in Portland, but not to be governed strictly by that, get as near that price as possible, but in order to get business make concessions; in other words buy the business. During June I solicited business only from our dealers. At that time we had Balfour-Guthrie, Nottingham and McCracken, appointed by me orally. At that time dealers in cement in Portland were paying the full market price and I gave Nottingham & Company 20 cents a barrel commission and a 1% discount and I gave Balfour-Guthrie & Co. and McCracken Company, 10 cents a barrel commission with a 1% discount for ten days. When we entered the market in Portland the California mills had a \$2.30 price including sacks, ex-wharf, or on car at [278] Portland. The dealers were paying the California cost, \$1.90 net; when I speak of gross \$2.30 there are four sacks to the barrel, sacks 10 cents each. The dealer pays for the sacks, when he makes the pur-

chase, but when the sacks are returned he is credited 10 cents each or 40 cents a barrel, making the net price to the dealer \$1.90. The price was established here when we entered the market. We gave one dealer 20 cents off, instead of \$1.90 that meant \$1.70 to one dealer; to the other dealers instead of \$1.90 we gave them \$1.80, a cut or commission of 10 cents. When I appointed McCracken & Company, Nottingham & Company and Balfour. Guthrie dealers I knew the territory into which they were shipping. Nottingham & Company were selling in Washington. McCracken was selling in Washington. Boats called at their wharves and picked up cement; they were selling in Portland and tributary towns around also. I knew these facts when I appointed them. When the Oregon Portland Cement Company entered the market it did not sell direct to the consumer; in 1916 it sold directly to the dealer only. In appointing these dealers I knew they were shipping throughout Oregon and parts of Washington and made them no restrictions as to where they should ship or supply the cement sold them. I know Mr. Esterday. He is a concrete sewer pipe manufacturer having a place of business in Portland and one in Vancouver. This was in 1916, he has several more yards now. I met him in 1916: I solicited his business for the Oregon Portland Cement Company. I started talking with him about the latter part of May. The letter, Exhibit 143, dated July 13, 1916, was written and signed by me. It speaks

of the physical test of cement. Briquets are made up and broken in 7 and 28 days. Specifications of the City of Portland [279] call for all cement to pass the 28 day test. It is the practice to store cement in a quantity so that the tester can take his samples and pass on them. I recognize this paper (paper marked Defendants' Exhibit 27). It was received by me. I solicited this order, it is the first order entered on our books and was for the first car shipped from our mill. This car was shipped June 9, 1916 to the McCracken Company. I recognize these papers, one is the bill of lading for the first car shipped from our mill to the McCracken Company, and the other is the expense bill showing delivery June 13th to the McCracken Company."

The papers identified by the witness are introduced in evidence, marked Defendants' Exhibit 28.

"A test could not be made of the cement until 28 days after the delivery of this car. In the City of Portland all cements must be listed as a grade passing the specifications of the American Society of Testing Materials before they can be accepted by the City of Portland. I first talked to Mr. Esterday in reference to the sale of cement sometime in May but was not able to sell him at that time. I made him a cut; I gave him 10 cents a barrel, price \$2.30 Vancouver, less 10 cents a barrel on the first shipment. I saw him several times before I secured an order and made him a concession sometime before I shipped him. In making

cement sewer pipe the cement used is of the highest grade, passing all specifications. The manufacturer hesitates to use a new cement and they generally tell you that they will wait until somebody else uses it, until it is established and the qualities known. I don't think in talking to him the question of the listing with the City was discussed. I met Mr. J. C. Ainsworth; he is a stockholder in the Oregon [280] Portland Cement Company and is president of the United States National Bank. When that bank put up a new building in Portland a quantity of cement was used. I called on Mr. Doyle, the architect, but he would not use our cement on such important work as the bank and he said it had not been tried and was an unknown quantity. I made my first trip in Washington in the early part of August, 1916, as salesman for the Oregon Portland Cement Company; went in an auto and made all the towns between Vancouver and Olympia on the north and all the towns in the Grays Harbor country as far as Aberdeen and Hoquiam. The purpose of that trip was to sell Oregon Portland cement. Conditions in that territory at that time were very quiet. I called on both cement dealers in Vancouver; tried to impress upon the Columbia Feed & Fuel Company the advisability of handling Oregon cement as our mill was so close to their business; told them that our price would be our competitor's price and our sacks were 10 cents while the Washington mills at that time were allowing only 7½ cents for

sacks; this would be 10 cents a barrel reduction. In time of car shortage or shortage in transportation facilities the nearness of the mill is important on account of delivery. The dealer has to carry a smaller stock. I saw Mr. Walter and Mr. McFadden of the Columbia Feed & Fuel Company. I called on the Bennett Hardware Company in Vancouver and tried to sell them but was unsuccessful. I found a friendly working arrangement between the Columbia Feed & Fuel Company and the Washington Portland Cement Company. Bennett Hardware Company were handling the Superior Portland cement. Mr. Bennett stated that Mr. Eden, president of the Superior, made a concession of 5 cents a barrel special over regular terms. From [281] Vancouver I went north, went to Kalama and called on the dealers; conditions were very quiet. I think the dealers were buying from Nottingham & Company in small quantities by boat. I went to Kelso in Washington; Kelso was quiet. Some work was going on and the dealer there was buying from Nottingham & Company by boat. J. S. Robb was a dealer in Kelso; I think I made a sale to him on that trip but I am not sure. I made a sale to him at some time, either on that trip or on a subsequent trip. This sale caused some trouble for the cement company as Nottingham & Company had been selling them and paying a higher price than that at which I sold and Nottingham was rather put out about it. I went to Castle Rock, saw the dealer there

and tried to get some business but Castle Rock was quiet. I stopped at Toledo, Washington; there was practically nothing doing at Toledo. I called on the dealers there, quoting prices and meeting the competition. I went to Centralia on that trip, called on the dealers there, quoted prices and met the prices of our competitors. I found out what the dealers were doing in the various towns and from whom they were purchasing and what price they were paying. I met those prices. I went to Montesano, but am not sure whether it was on this trip or the next. I went to Aberdeen and Hoquiam on this trip. Montesano is about 15 miles this side of Aberdeen. I do not recall Simmons Transfer. I remember the name Bush; I think he is located in Montesano. At that time in Montesano they were bringing cement over from Aberdeen by truck. There was no carload business in Montesano. At Aberdeen I called on Mr. Lebo and Mr. Gentry. I called to see Mr. Darragh but I don't remember seeing him. In Hoquiam I called on Mr. Foster. I used my best salesmanship [282] to sell these dealers and was not successful. I think we had shipped to Mr. Lebo prior to this time. I offered to meet all competitive prices. The town of Elmer is in the Grays Harbor country. I visited this town on this trip with Mr. Lebo, sold to Hatfield,-Nickelson & Hatfield; they had a piece of sidewalk work over at Oakvale and I took their order. This sale was made at \$2.58. The Washington price was \$2.60,

\$2.60 a barrel to Hatfield. We paid Lebo a commission of 10 cents out of that price, making the price \$2.48. When I came back from that trip. I went to eastern Oregon. I wrote the letter dated July 12, 1916, Plaintiff's Exhibit 142, to Clark M. Moore after he had gone back to Denver. E. Moore was the person mentioned in this letter as 'vour brother' who was a salesman for the Oregon Portland Cement Company upon the road. The office at that time was under my supervision. I heard a part of Mr. Aman Moore's testimony. I am mixed up myself in regard to what he said was the limitation of territory agreed upon by the Oregon Portland Cement Company. Ashland is south of Roseburg; it is practically the last town in Oregon until you strike the California line. J. E. Moore was out under my supervision selling cement. Exhibit 142 dated July 12th refers to a circular letter sent out by Mr. Clark M. Moore. I use the term 'circular' letter; it may be misleading. Mr. Clark Moore dictated a form letter and sent it out. These form letters were sent all over Oregon and Washington, eastern Oregon, southern Oregon and Western Washington. They were sent east of Umatilla and into western Washington. We did not recognize any lines or imaginary lines or lines drawn through the Deschutes or Umatilla on the east, the Columbia River on the north and Drain or Roseburg on the south. These form letters [283] were not confined to any territory. I recognize these two papers; they

(Testimony of C. T. W. Hollister.) are the form letter or circular letter referred to by me."

The papers identified by the witness were introduced in evidence marked Defendants' Exhibit 29.

"Wasco is on the Shaniko branch, the other side of the Deschutes River. The letter, Plaintiff's Exhibit 144, from Clark Moore to me, dated July 9, 1916, was written after Clark Moore had been here and returned to Denver and when I was in charge of the office. This letter speaks of shipments to Gresham. The rail rate from Portland to Gresham was 5 cents a hundred and a dealer would have to buy a carload to get that rate. Trucks coming in with vegetables, garden produce, would haul cement back at the carload rate; this would save the dealer from buying an entire carload at one time. This matter was mentioned in that letter probably as I had brought it to Mr. Clark Moore's attention as something which I had handled, passed on and settled. I had met the condition; I had authority to use my own discretion in all matters. My second trip to Eastern Oregon was by auto. I stopped at all the towns along the Columbia River such as Bridal Veil, Hood River, The Dalles, then crossed the Deschutes and made the Bend branch as far as Then I made the Shaniko branch, the Condon branch and went into Pendleton. I canvassed the territory trying to sell cement. I think I returned from Pendleton to Portland. This trip was made during August. I recognize this paper as a carbon copy of a letter."

The paper is received in evidence marked Defendants' Exhibit 30 and read to the jury.

"When I made the Washington trip and the two Eastern [284] Oregon trips referred to in this letter, Exhibit 30, J. E. Moore was in charge of the Portland sales office. I was transferred from the sales office and given an outside territory, especially Eastern Oregon, upon my request made to Mr. Clark M. Moore. I made the trip into Washington referred to in that letter. I made the same territory I made on the first trip; this trip was made in the early part of September. I visited Woodland, Washington; it was very quiet. I do not remember whether I saw the dealers; I called on them and used my best efforts to obtain an order. I always attempted to ascertain the price at which competitors were selling and to know exactly what our competition should be. I offered to meet our competitors' price and in this territory at this time especially the Washington mills were rebating 7½ cents for sacks and we gave a rebate of 10 cents. I would find out our competitors' prices by asking the dealer; if there was any question about it I would ask for a quotation or invoice. On this trip I went to Kelso and solicited business there, made the entire territory, every town along the line, Castle Rock, Hoquiam, Aberdeen, Chehalis, Centralia, Olympia. I don't recall whether I made any sales at Olympia on that trip or not. The Olympia Hardware Company, a dealer there, claimed that our competitors were making concessions. I don't re-

member what the concession was. We sold the Chehalis Building Material Company but whether on that trip or not I don't remember. I saw Mr. Lebo on this trip. Our business with him was upon a cash basis as his financial rating was not to our liking. I was in close touch at all times with the sales office. I have recently checked the invoices with reference to the sales made at the time of these various trips about which I [285] have been testifying. On my March trip I sold the Walther-Williams Hardware Company at The Dalles, I did not make them any quotations on that trip; subsequently we met the market price of The Dalles and I made them a concession of \$5.00 a car for handling, amounting to about 3 cents a barrel. I recognize this file; it is a file of duplicates of original invoices that went from the office of the Oregon Portland Cement Company. I have examined all of them and they are all initialed by me. I took them off the records myself."

Thereupon one of these invoices was marked Defendants' Exhibit 31, offered in evidence and read to the jury.

"I was acquainted with the price of cement made by our competitors at Lexington, Oregon at that time. The California mills were quoting \$3.02 less 10 cents dealer's discount; Lehigh Company were selling at \$2.92 without any commission. We allowed the Tum-A-Lum Lumber Company 10 cents a barrel commission or a price of \$2.82 against \$2.92 of the Lehigh. We also allowed them a 5 cents a barrel discount against the California discount of

1%, 2 cents additional, making a cut against the California of 12 cents and a cut against Lehigh of 10 cents."

Thereupon another of these invoices, a bill to Kleinsmith Hardware Company, Baker, dated July 16, 1916, marked Defendants' Exhibit 32, was introduced in evidence and read to the jury.

"Baker, Oregon, is 242 miles east of the Deschutes River, 342 miles east of Portland."

Thereupon another of the invoices identified by the witness was introduced in evidence, marked Defendants' Exhibit 33, the same being bill dated June 23, shipped to Culver. [286]

"Culver is on one of the branch lines which runs on the Deschutes. The California price at Culver was \$3.02 with a 10 cent dealer's commission, making \$2.92; the Lehigh price was \$2.92 net. We quoted the Tum-A-Lum Company \$2.92, less the dealers' commission, \$2.82 net to the buyer which would be a cut of 10 cents against the Lehigh and a cut of 13 cents against any California mills due to our 5 cents a barrel cash discount and the California mills 1%. The freight rate from Oswego to Culver was 10 cents higher than the freight rate from Portland. Portland was the California shipping point outside of Portland. When I said 10 cents I meant 10 cents a barrel. The rate from Spokane was greater than our rate."

Thereupon another of the invoices identified by the witness was offered in evidence marked Defendants' Exhibit 34, dated June 23, 1916.

"Maryhill is in Washington, approximately 114 miles east of Portland."

Thereupon another of the invoices identified by the witness was marked Defendants' Exhibit 35, introduced in evidence and read to the jury.

"It is a bill to the Murphy-Wann Company, Marshfield, dated June 27, 1916. Marshfield is down on the Coast. The price of our competitors at Marshfield at that time, the time of this sale, was \$2.63. We met their price at Marshfield."

Thereupon another of the invoices identified by the witness was marked Defendants' Exhibit 36, introduced in evidence and read to the jury, the same being invoice to Bill Miller Lumber Company, Bend, Oregon, dated June 30, 1916." [287]

"Bend is located at the end of the Bend branch, 152 miles southeast of the Deschutes River, taking the Columbia River and the Deschutes as a starting point. The California list prices there were \$3.06 less 10 cents dealer's commission; the Lehigh price was \$2.96 and no commission; our price was \$2.96 less 10 cents dealer's commission and which was a 10 cent a barrel cut over the Lehigh price and a 10 cent cut over the California mill rate. The Lehigh rate into Bend was higher than ours; the California rate from Portland to Bend was 10 cents less than our rate from Oswego."

Thereupon another of the invoices identified by the witness was introduced in evidence marked Defendants' Exhibit 37.

[&]quot;Myrtle point is south of Marshfield."

Thereupon another of the invoices identified by the witness marked Defendants' Exhibit 38, was introduced in evidence and read to the jury.

"Goldhill is 151 miles south of Drain and is south of Roseburg."

Thereupon another of the invoices identified by the witness was introduced in evidence and read to the jury marked Defendants' Exhibit 39.

"Myrtle Creek is in Southern Oregon. It is 61 miles south of Drain and is south of Roseburg. I know the price of our competitors at that point. It was 2 cents higher than the price at which this bill was sold as we allowed 5 cents a barrel and the California mills only 1% discount."

Thereupon another of the invoices identified by the witness was marked Defendants' Exhibit 41, introduced in evidence and read to the jury. [288]

"McCall, Washington, mentioned in this invoice, is about 315 miles east of Portland on the Spokane, Portland & Seattle Railway."

Thereupon another of said invoices identified by the witness marked Defendants' Exhibit 42, was introduced in evidence and read to the jury.

"Dayton, Washington, mentioned in this invoice is 280 miles northeast of Portland, up here above Umatilla. J. D. Bower mentioned in this is the same man that I referred to in my letter to Mr. Clark Moore and who had made some inquiries after the circular letter was sent to him."

